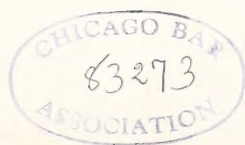






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Gen. No. 6336. October Term 1914. Ag. 40.

Filed April 16, 1915-

Acted by
James Hughes, Appellee,

Vol 194

Appeal from Macon County.

Illinois Central R. R. Company,
Appellant.

194 I.A. 1

Opinion by Thompson, J.

Plaintiff

~~Plaintiff recovered a verdict and judgment against defendant for \$1,000 as damages for personal injuries, from which the defendant rescues this appeal. The declaration, consists of several counts, some of which aver in substance that the appellant was negligent in running a switch engine over Sangamon Street without ringing a bell in violation of the state law; other counts aver a violation of the ordinances of the city of Decatur in backing said engine over said street intersection in the night time without a conspicuous light on the rear end of said engine.~~

The evidence shows that appellee was injured on November 15, 1913 about seven o'clock in the evening. Sangamon Street runs east and west in the City of Decatur and crosses the tracks of appellant railroad substantially at right angles about a block north of the station of appellant. The station of appellant is on the west side of its tracks and a few rods north of the Wabash Railroad which crosses the appellant railroad substantially at right angles. The Wabash station is south of its track and west of the intersection, so that the stations are very near to each other. There are three tracks of appellant which cross Sangamon street, the eastern

Filed April 16, 1913-

1913.A.1

one is known as the north bound track; the center one is known as the south bound main track; and the western is the passing track. The right of way of appellant south of Sangamon street is about 200 feet wide. A switch track branches off the north bound main to the south at the south side of Sangamon street, and leads to what are known as cinder pit tracks, and other tracks lead off the passing track just south of Sangamon street in a southerly and south westerly direction curving towards the Wabash railroad. These last described tracks are known as repair tracks.

The appellee, a man 34 years of age was in the employ of appellant as a car carpenter and was not at work on the afternoon of the day he was injured having laid off about eleven o'clock to get his pay check and to see about a shortage of \$1.13 in a former pay check. After getting his check he went to a saloon and then to his home, which is north and east of the intersection of appellant's railroad and Sangamon street. On the evening of the day he was injured the appellee appears to have been in the neighborhood of the railroad stations, but does not remember how or when he got there and claims to have started home on a path west of the passing tracks, and testifies that he went north until he reached Sangamon street and then went angling across Sangamon street towards the north east; that a train was coming from the north on the south bound main track between Sangamon street and Marietta street, the next street north, and that the switch engine

backing up struck him on Sangamon street, just south on the side walk
to pass the tracks on the north side of Sangamon street, and that he knows
nothing more of what happened until he was in the hospital with his hand
cut off. He testifies that there was no light on the engine that struck
him and that the bell was not ringing at the time he was injured.

The evidence shows that there were two switch engines on the cinder
pit track that evening; that the night switching crew that went to work at
seven o'clock, found that their engine was the most southerly of these two
engines, and to get that engine, the north engine backed out upon the north
bound main across Sangamon street and the south switch engine backed out
upon the main track and then ran south a short distance to let the first
engine run back upon the cinder pit track and then the switch engine that
the crew were going to work with backed up north across Sangamon street.
On this engine were the engineer, a fireman and two switch men. The switch
men were standing on the foot board at the south or front end of the engine
when the engine was near Marietta street one of the switch men saw a man on
the ground on the east side of the track they had just passed upon, about
20 feet north of Sangamon street; the engine was immediately stopped and
the man by the side of the track was found to be Applebee. The contention
of Applebee is that he was struck by the engine on Sangamon street while he
was crossing the street, and dragged to where he was seen by the switch-men,



the contention of appellant is that appellee was walking on the right of way towards his home and struck by the engine at or near where he was found.

There have been two trials before a jury. At the first trial the jury disagreed. On the last trial appellee produced two new witnesses; one of these Homer Goodrich a saloon porter, testified that he was on Sangamon street that night just before seven o'clock and saw a man coming from the south on the east side of the appellant's track walking on the line thirty feet south east of where the witness was and when the car was on Sangamon street, a switch engine approached him and he did not see the man any more; that the witness then went to a saloon, got a drink and then went to where the appellee was found near Marietta street. The other witness, Harry Conrad, testified that he on November 12, about seven P. M. drove in a single buggy on Sangamon street to the east side of the railroad and had to stop because the crossing was blocked, and that he saw the movements of the engine from the cinder pit track to the main track and saw a man standing on Sangamon street. He fixes the date by the fact that he was coming to get a pair of overalls that he got that night on credit. This witness testified that this was the first time he was a witness in the case; that he had never talked to appellee, or his attorneys or any other person about what he saw that evening and that he did not know how they got the information that he knew anything about the case nor how he happened to be a witness in the case.



These two witnesses testified that the night was dark and misty, and that there were no headlights on either end of the engine and that no bell was rung or whistle blown. Appellee also testified that he had a ruler and other things in his pocket when he was injured. A brother of appellee testified that he heard of his brother's accident about nine o'clock that night; that the next morning he went to the railroad where appellee was supposed to have been injured and examined the place and found his brother's wallet and a fifty-cent piece on Sangamon street on the south side of the Grand Hall between the two main tracks near the east track, and after that he went to the hospital to see his brother. Appellee's memory as to what he did on the afternoon he was injured or where he was or went, or how he got to the vicinity of the station was a blank; he remembers nothing about his movements until he started from the vicinity of the station to go home.

The railroad employees all testified that there were head lights burning on both ends of the engine, that the engines were running slow, four or five miles an hour, that the bells were ringing on both engines when they crossed the street and that there was an automatic electric crossing bell ringing. The engineer testified also that he was looking out of the cab below and he would have seen appellee in front of the engine unless he came to the track within 12 feet of the front of the engine. The fact that appellee was seen by the switchman on the engine on a dark and misty night would seem to show that the head light on that end of the engine was burning.



Two witnesses testified that the appellee told them at the hospital that the way he came to be injured was, that he was walking on one track on which a train was approaching, and that he stepped out of the way of that train and in front of another and was injured.

The court stenographer testified that he, after the accident, at the request of the claim agent of appellant, accompanied the agent to the hospital and took an interview between the claim agent and appellee in shorthand, part of which is:- Question. "Tell me how you came to get hurt?" "Well I can't know as I can just remember. I remember stepping out of the road of one and then right up against another." Question, "You were stepping out of the road of one what?" Ans. "One engine; I stepped right in the road of another engine." Question. "Were you walking between the main tracks at that time?" "As near as I remember I was. Yes, Sir." Question. "If you had remained right between the tracks you would have been safe?" "Well possibly if I had not stepped either way I would have been safe." This statement is in line with the statement of the appellee's witness, Sandrich, that he saw a man "coming from the south coming to the north on the east side of the track." Question. "Right straight along the track?" "Yes, sir, walking along the ties like that" "I guess he was aiming to walk the ties; as he went across Sangamon street he was right on the crossing when the train approached him and he disappeared, and I never saw Hughes from that until he



" picked up by the train men. The evidence of this witness and the statements of appellee made at the hospital show that appellee was not crossing Sangamon street, but was using the right of way as a road to go towards his home, that he was a trespasser and not entitled to recover. Appellee having voluntarily used the right of way for his own purposes and having been injured while so doing, the judgment cannot be sustained. The judgment is reversed with a finding of fact that appellee was a trespasser on the appellant's right of way when injured.

Reversed.

Gen. No. 6251.

April Term, 1914-

Ag. No. 57-

Filed May 26, 1915-

Gray Coal Company,
Appellee.

vs.

;

Appeal from Circuit Court

Danville, Urbana & Champaign

Vermilion County-

Railway Company.,

Appellant.

194 I.A. 11

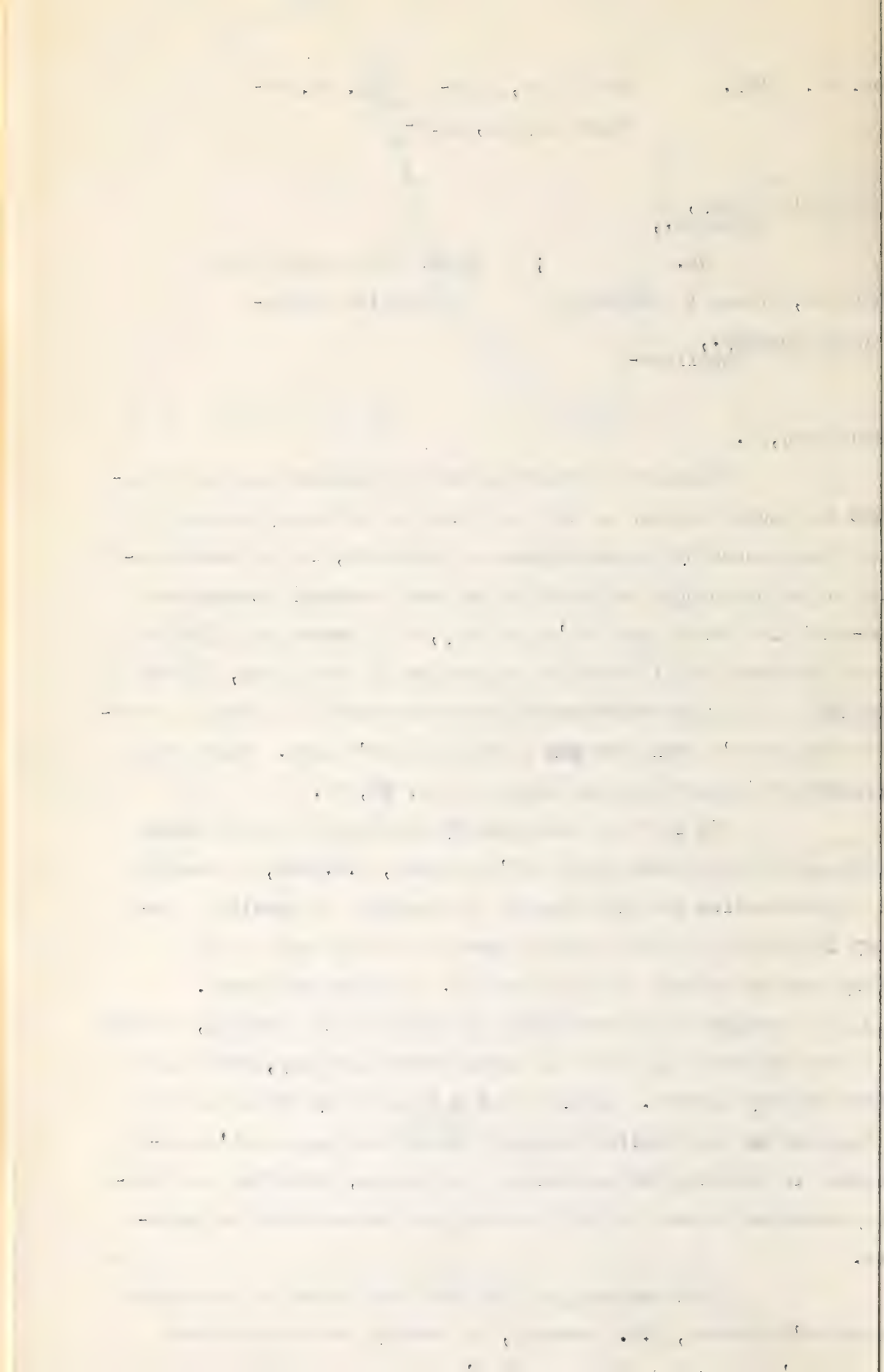
Scholfield, J.

~~This is an action in case by appellee against appel-~~
~~lant to recover damages to its coal mine and machinery alleged to~~
~~have been caused by the negligence of appellant, in the construct-~~
~~ing and maintaining a railroad bridge over a natural stream about~~
~~one-half mile below appellee's property, with bents and piling so~~
~~close together that it made an obstruction in the stream, thereby~~
~~causing an ice gorge which acted as a dam causing the water to over-~~
~~flow the river's banks and and flood appellee's mine. There was a~~
~~verdict and judgment against appellant for \$5,000.~~

~~It is first contended by appellant that the Court~~
~~erred in not permitting appellant's witness, N.M. Burk, to testify~~
~~to a conversation had with him by the managers of appellee com-~~
~~pany in regard to there being no levee across the end of the~~
~~strip mine to protect it from overflow. This was not error.~~
~~The conversation took place before the overflow in question, and did~~
~~not tend to prove any matter in issue before the jury, about which~~
~~there was any dispute. Appellee was not under any obligations to~~
~~anticipate the results that might follow from appellant's neg-~~
~~ligence in building and maintaining the bridge, but after the over-~~
~~flow occurred it was its duty to make the loss as light as possi-~~
~~ble.~~

a witness testified for the appellee

It is next urged that the Court erred in permitting
appellee's witness, J.E. Romeheld, to testify as an expert over
appellant's objection that appellant's bridge was insufficient to



take care of ice and water at a time when ice was going out of the stream, crossed by the bridge. To the question which elicited the answer complained of, a general objection was made. In response to the request of the court, counsel for appellant stated specifically, as the only ground for the objection, that the witness was incompetent because he had not qualified as an expert. The witness had previously testified that he was a civil engineer; that upon his graduation from a technical college he became bridge draftsman in the engineering department of the City of Chicago, after which he was promoted to engineer in charge of the bridges and was subsequently advanced to the position of superintendent of bridges in that city, which last position he held for ten years; that after he left the employment of the city he entered into the bridge construction business in which he had been engaged for over ten years.

The Court overruled the objection, holding that the witness was competent to testify and that the weight to be given to his testimony was for the jury to determine. This was not error, as the witness had ~~not~~ qualified sufficiently to make his evidence competent, and, as the objection to the question had been made specific and based upon the sole ground mentioned, appellant cannot now complain that the question or answer was objectionable upon other grounds. Moreover, the witness shortly thereafter gave substantially the same answer to a hypothetical question to which no objection had been interposed or motion made to exclude the answer thereto, and even if the ruling of the court as to the first question and answer had been erroneous, it thus became harmless error.

It is next urged that the Court erred in instructing the jury as to the measure of damages. The instructions were proper on that question. O'Connell, vs. Kellyville Coal Col., 134 Ill. App. 311-Complaint is also made of the court in giving certain other instructions for appellee and in refusing certain instructions offered by appellant. We do not find any reversible error in the giving or refusing of instructions.

(In the original brief and argument filed by appellant no point was raised that the amount of the verdict was excessive.

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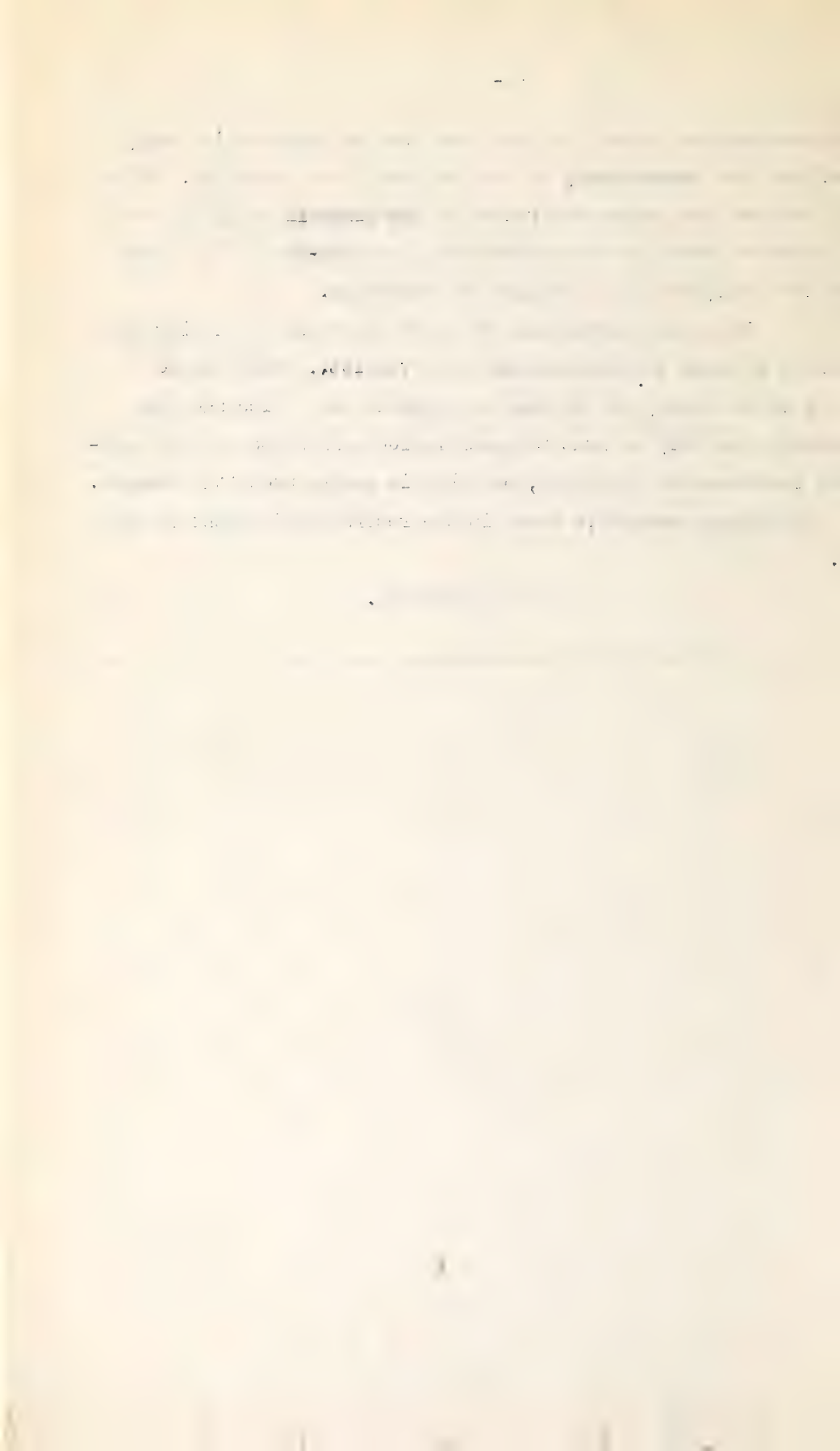
... and ...

... and ...

but
This question was raised for the first time in Appellant's reply brief and also ~~subsequently~~ in its petition for a rehearing. It is well settled that points not raised in the ~~original~~ original brief and argument cannot be considered when presented ~~for~~ for the first time in a reply brief or petition for rehearing.

It is also urged that the court erred in permitting the appellee to amend its declaration after verdict. *which does* There was no change in the theory of the case on which it was tried and the amendment *so as* was only to make the declaration correspond with the evidence introduced on the trial, and that is proper under the statute. Finding no reversible error in the record the judgment is affirmed.

A F F I R M E D .



194 A 14

111

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

Hon. Harry Higbee, Justice.

✓ Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 14

The People etc

ERROR TO
APPEAL FROM

vs.

No. 7

October Term, 1914.

Court

Franklin COUNTY

Leubrock

TRIAL JUDGE

HON.

Thomas M. Harris

Term No. 7.

Agenda No. 1.

October Term, A.D. 1914.

The People of the State of Illinois,	}	Error to the County Court of Franklin County.
vs. Defendants in Error,		
Henry Tenbrook,		
Plaintiff in Error.		

McBride, P.J.

The trial of this case resulted in finding the defendant guilty and judgment thereon upon eight counts of the information.

The plaintiff in error, hereinafter called defendant, was prosecuted upon an information containing eight counts, each of which charged him with the sale of intoxicating liquor in anti saloon territory. There were several witnesses testified for the plaintiff that they had purchased of the defendant a drink called by some of them "jingo", and others "beer" or something that looked like beer but they did not know what it was. Practically all of the witnesses testified that they did not know whether enough of it could be drunk to make a person intoxicated or not. The witnesses testifying most strongly as to its intoxicating qualities was witness Cook, who, after having stated "Could not say it was intoxicating, if I drank enough of it I believe it would make me sick; don't know whether it would be intoxicating", was then asked the further question, Q.-- If taken in sufficient quantities was it intoxicating? A.-- Well I guess it would. Also, Oscar Thomas, Alley Burket made similar answers, after having stated in substance that they did not know whether it would make them drunk or not.

The testimony taken at a hearing with reference to the in-
toxicating qualities of the drink sold is very meager. At
the conclusion of the trial the jury retired and it was agreed
by and between the parties to the suit, "That should the jury
agree upon a verdict before the convening of court at 1:15 P.
M. that they might sign and seal a verdict and bring the
same into court with the jury on the convening of court." This
court convened eleven of the jurors were present and the ver-
dict was opened and read in the presence of the eleven jurors
and was in the following terms, "We, the jury, find the de-
fendant guilty in manner and form as charged in the indict-
ment in count 8 of said information, which was signed by 11
the jurors. Therefore the court instructed of the jurors pre-
sent whether they intended to find the defendant guilty on
count 8 of the information or on the eight counts of the in-
formation, and the court was then and there informed by the
eleven jurors present that they intended to find the de-
fendant guilty on eight counts. The court then directed the el-
even jurors to return to the jury room in charge of the cler-
ker and place their verdict in the box that the jury intend-
ed it to be placed in while the eleven jurors were waiting the court
juror E. D. Doherty entered the court room and after having
been instructed by the court to retire to the jury room with
the jurors aforesaid, joined the other eleven in the de-
cision of the verdict, and after being out for a time the
jury returned into open court with the following verdict:
"We, the jury, find the defendant guilty in manner and form
as charged in the information in count 8 of said information.
Ac. 1 U. T. Ainsworth.
Ac. 2 R. A. Browning.
Ac. 3 Miss Jackson.
Ac. 4 George Horta.
Ac. 5 J. A. Williams.
Ac. 6 J. A. Williams.
Ac. 7 J. A. Williams.
Ac. 8 J. A. Williams.
Ac. 9 J. A. Williams.
Ac. 10 J. A. Williams.
Ac. 11 J. A. Williams.

And the verdict as rendered was received, published and recorded by the court as the verdict of the jury herein. Motion for new trial was overruled, and thereupon judgment was rendered upon the verdict and it was adjudged that the defendant Henry Tenbrook, on each of the said counts 1, 2, 3, 4, 5, 6, 7, and 8 be imprisoned in the County jail of Franklin County, Illinois, for a period of ten days and that upon the eighth count be fined the sum of fifty dollars, and was also required to pay the costs of the suit. The defendant by his counsel accepted to the action of the court in inquiring of the jury as to whether or not they intended to find the defendant guilty on count 8 or on the eight counts of the information, and to the oral instruction given by the court to return to the jury room and place their verdict in the form the jury intended it to be. Also the receiving and recording of the latter verdict and the entering of judgment thereon, and, by his errors so assigned, questions the sufficiency of the evidence to sustain the verdict, the action of the court in permitting the amendment and proceedings had thereupon, and the sufficiency of the amended verdict, and also claims that the court erred in overruling his motion for a new trial and in rendering judgment upon the verdict.

Believing as we do that this case will have to be reversed upon other questions we deem it unnecessary to examine the evidence and determine whether or not it is sufficient to warrant a conviction as its sufficiency will have to be submitted to another jury.

The principal error argued by counsel for plaintiff and defendant is, that it calls in question the right of the court to inquire of the eleven jurors if they intended the

And the verdict as rendered was received, published and recorded by the court as the verdict of the jury herein. Motion for new trial was overruled and thereupon judgment was rendered upon the verdict and it was adjudged that the defendant Henry Fendrick, on each of the said counts 1, 2, 3, 4, 5, 6, 7, and 8 be imprisoned in the County Jail of Franklin County,

Illinois, for a period of ten days and that upon the eighth count be fined the sum of fifty dollars, and the defendant be required to pay the costs of the suit. The defendant by his counsel requested the action of the court in instructing the jury as to whether or not they intended to find the defendant guilty on count 8 or on the eight counts of the indictment, and in the oral instruction given by the court to the jury intended it to be. Also the receiving and retaining of the latter verdict and the entering of judgment thereon, and by his errors he assigned questions the sufficiency of the evidence to sustain the verdict, the action of the court in persisting the defendant and proceedings had thereon, and the sufficiency of the rendered verdict, and also stating that the court erred in overruling his motion for a new trial and in rendering judgment upon the verdict.

Following as to that this case will have to be reversed upon other questions as seen it unnecessary to examine the evidence and determine whether or not it is sufficient to warrant a conviction as its sufficiency will have to be admitted to another jury.

The principal error argued by counsel for defendant and defendant is, that it calls in question the action of the court to include of the above where it was rendered the

first verdict returned to be a conviction of the eighth count of the information or upon eight counts of the information, and after being advised that they intended it to be upon the eight counts directed them to retire and amend their verdict, and the sufficiency of the second verdict returned by them. The first verdict returned was definite and found the defendant guilty upon the eighth count of the information. There was not such ambiguity in the language of the verdict as to justify the court in inquiring whether they meant the whole of the eight counts or the eighth count.

The jury after having found this verdict had been permitted to seal the verdict, separate and go to their homes. It is the policy of the law, and indeed provided by statute, that "When the jury shall retire to consider of their verdict in any criminal case, a constable or other officer shall be sworn or affirmed to attend the jury to some private or convenient place and to the best of his ability keep them together without meat or drink, water excepted, unless by leave of the court until they shall have agreed upon their verdict, nor suffer others to speak to them, and that when they shall have agreed upon their verdict he will return them into court"; but it declares "That in any case of misdemeanor only, if the prosecutor for the people and the accused shall, by himself or counsel, agree, which agreement shall be entered upon the minutes of the court, they may dispense with the attendance of an officer upon the jury" *Lewis vs. People*, 44 Ill., 455.

There is no pretense of an agreement in this case that the attendance of an officer upon this jury was waived. This doctrine is fully confirmed in the case of *Farley et al. vs. People*, 138 Ill., 97. The court in considering the case

first verdict returned by the jury, and the sufficiency of the evidence of the information or knowledge of the defendant, and after being advised that they intended it to be upon the eight counts directed them to retire and amend their verdict, and the sufficiency of the second verdict returned by them. The first verdict returned was definite and found the defendant guilty upon the eight counts of the information. There was not such ambiguity in the language of the verdict as to justify the court in requiring whether they meant the whole of the eight counts or the eight counts. The jury after having found this verdict had been permitted to seal the verdict, separate and so to their homes. It is the policy of the law, and indeed provided by statute, that "When the jury shall retire to consider of their verdict in any criminal case, a constable or other officer shall be sworn or affirmed to attend the jury to some private or convenient place and to the cost of his salary fees then to be paid. Except without waste or drink, water excepted, unless by leave of the court which they shall have agreed upon their verdict, nor suffer others to speak to them, and that when they shall have agreed upon their verdict they shall return to the court but it declares "That in no case of indictment only, of the prosecutor for the people and the accused shall, by himself, or counsel, agent, or friend, be admitted to be present at the trial of the case, they may distance with the defendant, or other officer upon the jury. People vs. People, 121, 122, 123. There is no statement of an agreement in this case that the attendance of an officer upon this jury was allowed. This doctrine is fully contained in the case of People vs. People, 124 Ill., 37. The court in considering the case

jury might separate before they had returned their verdict into open court. There is in fact nothing in this record to show that the court in any way did dispense with a sworn officer or did authorize the jury to separate." It seems that an agreement

that above cited seemed to be of the opinion that where a jury has its verdict under consideration that the officer must in all cases be present with the jury until a final verdict is reached, unless waived, and that the separation of the jury before the final verdict is concluded would be a violation of this statute, even though they are simply permitted to go home, and we can see no difference in principle in allowing a jury to separate for a couple of hours than for a day or even more, as the shorter time gives an opportunity to mingle with the people without being instructed by the court, where they might be influenced in their verdict, and the court there says, at the bottom of page 101, "There is no agreement that a sworn officer might be dispensed with or that the jury might separate before they had returned their verdict into open court. There is in fact nothing in this record to show that the court in any way did dispense with a sworn officer or did authorize the jury to separate." It seems that an agreement in this case provided only, "That they might sign and seal their verdict and bring the same into court with them upon convening of the court"; and while it might have been the intention of the parties and of the court that the jury might separate, yet the agreement does not permit this, and we think it was error. Counsel for plaintiff seek to distinguish this case from the Farley case for the reason that the amendment made in the Farley case was in a material matter and that in this case it was only in form. We cannot believe that the amendment made was only a matter of form because in the first verdict it was clearly a conviction upon the eighth count while in the second verdict it is claimed that the conviction was

[illegible]

upon the eight counts of the information, which we believe would be a very material change. The second verdict returned into court was, in our opinion, not definite. The mere fact that the jurors inserted the words "Ac.1,2, etc.", before eight of the names of the jurors and beneath the verdict, does not, as we read it, find the defendant guilty upon 8 counts of the information. It appears to us that the "AC." and the figures placed as they were are meaningless, and this leaves the verdict in a worse condition than it was before and absolutely indefinite as to the counts upon which a conviction is had, and we are of the opinion that the court was not warranted in rendering judgment for eight distinct offenses upon this verdict, and the judgment of the lower court is reversed and cause remanded.

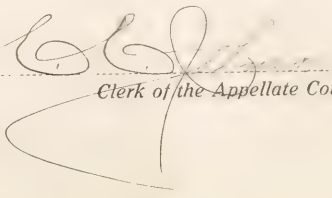
REVERSED AND REMANDED.

RECEIVED

(Not to be reported in full.)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

NON

712 712

194 A 17

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

194 I.A. 17
THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Steinguth

ERROR TO
APPEAL FROM

vs.

No. 21

Court

October Term, 1914.

City
Saint Louis COUNTY

Ben. Steinguth

TRIAL JUDGE

HON. R. A. Flannigan

Term No. 21.

Agenda No. 7.

October Term, A. D. 1914.

Josephine Weisguth,
Appellee,
vs.
Supreme Tribe of Ben Hur,
Appellant.

Appeal from the
City Court of
East St. Louis.

McBride, P.J.

This was an action upon a life insurance certificate issued by appellant to one Emma Mansfield on September 25, 1911, wherein appellee was made the beneficiary. The appellee recovered judgment in the trial court for \$1,118.64 to reverse which judgment the appellant prosecutes this appeal.

The declaration consisted of one count and alleged that appellant was incorporated under the laws of the State of Indiana and engaged in the business of life insurance as a fraternal benefit society in the State of Illinois; That on September 25, 1911, it issued to Emma Mansfield, sister of appellee its contract of insurance, and that in consideration of certain assessments and charges to be paid by the said Emma Mansfield that upon her death and proof thereof appellant should pay to appellee the amount of one thousand dollars. The declaration further avers the death of Emma Mansfield in November, 1911; that appellee furnished proof of said death and demanded payment of the one thousand dollars, which was refused. To this the defendant filed the general issue with notice that it would make certain defenses, which will be hereinafter

considered. A trial was had at the May Term, 1913, of said court and after the plaintiff has introduced his evidence the defendant entered a motion to direct a verdict for defendant, and the plaintiff thereupon took a non-suit, this November and during the May Term of said court the plaintiff entered a motion to set aside the order of dismissal and re-instate the cause, which motion was by the court allowed and the cause re-instated and it thereafter came up for trial at the September term of said court and resulted in a verdict for the plaintiff, which verdict was set aside and a new trial awarded, and was again tried at the March Term, 1914, of said court and resulted in a verdict for plaintiff of \$1,115.84, upon which, judgment was rendered and this is the verdict and judgment sought to be set aside by this appeal.

~~It appears from the record in this case that~~

September 15, 1911, Emma Mansfield made application to become a member of the order of ~~Beneficial~~ and on the same day was examined by Doctor Charles E. Graer of Charleston, Illinois, and recommended as a suitable and proper person to become a member of said order, and on September 25, 1911, a certificate of beneficial membership was issued to the said Emma Mansfield *and made payable to the appellee upon the death of Emma Mansfield,* conditional upon the payment of regular assessments therein specified.

It further appears from the evidence that Emma Mansfield paid Doctor Graer for the said examination and that the dues and assessments were thereafter paid by appellee until the death of Emma Mansfield which occurred on November 29, 1911. Thereafter proofs of death were made and appellant refused to pay the certificate as subject of policy and from

ulent statements claimed to have been made by Emma Mansfield in her application to become a member of this order.

Counsel for appellant and appellee seem to agree that in the construction of this contract that the application forms the basis of the contract and that the certificate and application should be construed together. (It is contended by counsel for appellant that the application contained a clause warranting the statements of the applicant to be true and that the appellee is bound by those statements, whether they were made fraudulently or not, or whether material or not, and that, if untrue in any particular, she would be barred from a recovery. The application signed by Emma Mansfield contained the following clause, "I do hereby agree and warrant as follows: 1. That the statements and answers contained in this application and medical examination to be full, complete and true and were read by me before attaching my signature thereto, and I hereby agree that these statements and warranties together with those hereinafter made to the examining physician in this application and the laws of the Supreme Tribe of Ben Hur, now in force and that may be hereafter adopted, shall form the basis of this contract for beneficial membership." Then further on and as a part of such application under Paragraph 3 it is further provided: "That any untrue or fraudulent answers made by me in this application, or any neglect by me to pay any monthly payment, assessment or per capita tax which shall be made by the Supreme Tribe as provided by the laws of the Order, or by the by-laws of the Court to which I belong, shall vitiate my beneficial certificate and

forfeit all payments made thereon." A determination of the question as to whether the statements are warranties or mere representations depends upon the construction of the foregoing clauses contained in the application. The former clause indicates an intention to warrant the statements, while the latter clause an intention to make them representations. Where the application contains a statement that might be construed as a warranty and also one that would be constituting a fraudulent and intentional misrepresentation, has been held in the case of *Fitch vs. A. P. and L. Ins. Co.*, 55 N.Y., 557, that under clauses of this character and in construing them together that such statements were held to be representations and not warranties, and this was quoted approvingly by the Supreme Court of the State of Illinois, in the case of *Continental Life Ins. Co. vs. Rogers*, 118 Ill., 474.

If it were intended by the parties to this contract that the statements contained in the application of the deceased were warranties and nothing more, then why the necessity of adding the clause making the certificate void if any of the answers made were untrue or fraudulent? As said in the case last above quoted, "Both of the elements forming the basis of the decision in that case are clearly present in this. Thus, the statement in the policy that the answers, statements, etc., in the application, etc., are warranted by the assured to be true in all respects, is followed by the additional statement, that if said policy has been obtained by or through any fraud, misrepresentation or concealment, said policy shall be absolutely void and null. It is clear, the fraud, concealment and misrepresentation here contemplated can have no application to anything other than the statements made in the application."

answers to the questions in the application. If true and full answers, there could be neither fraud, concealment nor misrepresentation, and if not full and true, upon the hypothesis they were warranties, the insured would incur a forfeiture of the policy, whether there was any intentional misrepresentation or suppression of the truth or not. If the answers, however, are simply representations, as contrasted with warranties, in the technical sense of those terms, then such of the answers, not material to the risk, as were honestly made, in the belief they were true, would not be binding upon the assured, or present any obstacle to a recovery. It is clear, therefore, the only way in which to give that provision of the policy relating to fraud, concealment and misrepresentation, any effect at all, is by treating the answers in the policy as mere representations, and not warranties." Continental Life Ins. Co. vs. Rogers, (Supra.)

"In the absence of explicit, unequivocal stipulations requiring such an interpretation, it should not be inferred that the insured or the Appellee took a life policy with the distinct understanding that it should be void if any statements made in the medical examinations should be false, whether the insured was conscious of the falsity thereof or not." Globe Life Ins. Assn. vs. Wagner, 183 Ill., 137.

The case of the Court of Honor vs. Clark, 125 App. 490, was very similar to the one now under consideration and contained the two clauses, and in that case the court says, That both elements are to be considered in forming the basis of a decision as to whether the statements make a warranty or representation solely, and further say the only way is

were to the question in the application. It goes not only
 however, there would be no other issue, and it is not
 representation, and it is not only and first, when the
 they are not only, and it is not only and first, when the
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 However, the policy representation, as representation
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 only issue, in the policy representation, and it is not
 ing now the question of representation, and it is not
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 provision of the policy representation, and it is not
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 "In the absence of explicit, unambiguous language
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 stated that the intent of the policy representation is
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 whether the language of the policy representation is
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 The case of the Court of Appeals in *United States v. ...*
 1960, the very question of the policy representation is
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 That both the policy representation is not only and first, when the
 of a policy representation, and it is not only and first, when the
 or representation, and it is not only and first, when the

which to give that provision of the policy relating to fraud concealment and misrepresentation any effect at all is by treating the answers in the policy as representations and not warranties.

It is ^awell settled rule of this State that in the construction of insurance policies they should, where it can be done, be so construed as to give to the parties the relief intended at the time of the taking out of the policy. We are of the opinion that the statements contained in this application are representations and not warranties and must be treated as such in the decision of this case.

It is said by counsel for appellant, in his reply brief, that even if the answers contained in the application are made representations by its terms, that it is limited; for the reason, as he contends, that the application does not include answers contained in the medical examination. The clause referred to and contained in the application, "That any untrue or fraudulent answer made by me in this application ***** shall vitiate my beneficial certificate and forfeit all payments made thereon"; and contends that the statements made to the examining physician should be separate from the statements made by the applicant. The trouble about separating the statements in what counsel calls the application from those contained in the medical examination, is, that they seem to have been submitted together as one application and divided into part one, which is composed of the family history, and nine different clauses attesting the things that shall constitute the basis of the contract, such things as shall constitute a forfeiture, also that which shall

[illegible]

constitute a waiver of notice, etc., (including many things not necessary to mention). This is followed by what is therein termed Part Two, which is the medical examination referred to. The whole of this examination is entitled, "Application for beneficial certificate", and the whole of it is introduced in evidence as Exhibit "1". One of the clauses contained in that part which counsel for appellant designates the application, is as follows; "And I hereby agree that these statements and warranties together with those hereinafter made to the examining physician in this application, etc., etc., ***** shall form the basis of this contract for beneficial membership." We cannot agree with counsel in his contention, but hold that when the whole of the contract and statements are considered, that the statements in answer to the questions of the medical examiner are as much a part of the application as the other statements. It is also contended by counsel for appellant that even if these statements are to be taken as representations that they were material and fraudulently made and therefore rendered the policy void. The statements claimed to have been falsely made were that the applicant stated, "That she had never had dropsy"; "Never had palpitation of the heart"; "never had swelling of the feet, hands, glands or eye lids"; that it had been five years since, "she consulted or was attended by a physician; that Doctor Fairbrother of East St. Louis last attended her for malaria." It does appear from the evidence that within the five years and in about the month of May or June, 1910, that she was examined by Doctor Allen who diagnosed her as having a tumor of the womb, that she also had a complication

[illegible]

of troubles with her bowels, heart and that there was a
dropical condition of her hips and limbs and that he tapped
the limbs, but in his examination he says, "I don't believe
I came out and told her that she had dropsy; it would re-
quire medical skill and ability to ascertain that fact. A
person not having any medical experience and ability would
not be able to tell that fact satisfactorily, I don't be-
lieve I ever told her she had dropsy." She was taken
to the hospital by Doctor Allen, but did not remain there long,
and was in fact treated by him for about ten days when she
got up and went away from the hospital. It further appeared
from the evidence that after that she was examined and treat-
ed by Doctor Ikneyan, who also made an examination of her and
came to the conclusion that she did not have a tumor and fatty
tissue on the abdominal wall. He also testified ^{that} he
treated her in 1908 for some derangement of the liver and
gall bladder but says he prescribed for her a very short
time, she seemed to get better and didn't probably have to
prescribe for her the second time. Very little treatment
was required then. He also treated her in 1910 and he says
at that time he found ^{that} the cardiac muscles of the heart ^{were} af-
fected, ^{that} the general circulation ^{was} impaired and after two weeks
treatment this disappeared, and her heart regained the usual
tone, and she went home. That he afterwards in March, 1911,
treated her for clotting of the blood in the big veins of the
leg which makes the heart work as such heavier. This was
April 21st or 25th. He was again called to see her in Oc-
tober, 1911, and found her suffering with acute Bright's
disease, from which she died on November 28, 1911; but says
that in March, 1911, at the time of his former treatment, he

[illegible]

examined her urine and found no evidence of Bright's disease at that time. At the time that Emma Mansfield made application to become a party of appellant's probate she was examined by Doctor C. E. Greer, the physician who made examination for the Court, at Charleston, and the testimony of the appellee and Emma Mansfield, a daughter of deceased, tends to show that at the time ^{of} the examination the deceased Emma Mansfield told Doctor Greer about the several treatments that she had received from Doctor Allen and Doctor Iknayan, the trouble with the swelling of the limbs, the heart failure, malaria, and all other troubles that she had had and been treated for, and it is claimed by counsel for appellee that when her application was received that the agents of appellant were possessed of all of this knowledge with reference to her condition, and, while it is true they do not claim that she told the doctor that she had dropsy, yet they do claim she told him she had swelling of the limbs and had the limbs tapped. It is, however, insisted that if she did have dropsy she did not know it, and that she had not been advised by the doctor that she was afflicted with dropsy, and this again is agree supported by the testimony of Doctor Allen who treated her for the swelling of the limbs, ^{Doctor Allen} who ~~said~~ that he did not tell her that she had dropsy, and that it would require medical knowledge and ability to ascertain that fact, and upon cross-examination of Emma Mansfield, daughter of deceased, it appears that the mother did not know and did not believe that she was afflicted with dropsy. At any rate, it does not appear from this record that the deceased, Emma Mansfield, knew that the swelling of the limbs with which she was afflicted

the dropsy, and it surely rested with the appellant to prove not only that she had been afflicted with dropsy but that she knew it was dropsy. It is true, Doctor Greer in his testimony denied that any such statements were made to him or that he had any information about the former sickness of the deceased, except such as is stated in the application, and counsel for appellant insist that the testimony of appellee and the daughter is false and perjured and that credit should be given to the testimony of Doctor Greer, and that this court should overrule the finding of the jury and the court below and reverse this case. These were purely questions of fact and the verdict of the jury should not be disturbed by this court unless it can say that the verdict was manifestly against the weight of the evidence, and upon this original question there is the testimony of two witnesses against the one; the jury observed the witnesses while testifying and had better opportunity to determine who was telling the truth than we have from the record, and we do not feel that we are called upon to say that the testimony of these witnesses is false in the face of the fact that two juries have found the issues for the appellee and that the latter finding has been approved by the trial Judge. Some one is mistaken or testified falsely as to what occurred at the time of this medical examination but that has been determined by the jury and we will not disturb it on that account.

It is contended by counsel for appellant that in as much as the deceased paid Doctor Greer for his services, and the application stipulated that he was her agent, that any information obtained by Dr. Greer could not be binding upon

... and it is entirely correct to say that the only way to prove
not only that the test is valid, but also that the test is valid
and it is correct. It is correct, and it is correct to say that
any doubt that may exist as to the validity of the test is
he has any information about the validity of the test
ceased, except as to the validity of the test.
I am not sure that the test is valid, but I am not sure
and the test is valid and the test is valid and the test is valid
is given to the test of the test, and the test is valid and the test is valid
should consider the validity of the test, and the test is valid and the test is valid
and the test is valid, and the test is valid and the test is valid
is the validity of the test, and the test is valid and the test is valid
count unless it can be shown that the test is valid and the test is valid
the test is valid, and the test is valid and the test is valid
there is the test of the test, and the test is valid and the test is valid
they observed the test, and the test is valid and the test is valid
opportunity is available, and the test is valid and the test is valid
have been the test, and the test is valid and the test is valid
and to say that the test is valid, and the test is valid and the test is valid
the test of the test is the test, and the test is valid and the test is valid
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the test is valid, and the test is valid and the test is valid
is so that the test is valid, and the test is valid and the test is valid
but that the test is valid, and the test is valid and the test is valid
and it is on the test.

It is suggested by counsel for the test that it
as much as the test is valid, and the test is valid and the test is valid
the test is valid and the test is valid and the test is valid
information obtained by the test, and the test is valid and the test is valid

the appellant. The Supreme Court has said, "While such stipulations are not usually inserted either in the application or in the policy, yet they cannot change the fact that a duly appointed agent of the Company acts in its behalf within the scope of his authority as otherwise determined, his acts are binding upon the company. *****."

"Where one makes true answers to the questions in the application for insurance, the validity of the insurance is not affected by the falsity of the answers inserted by the agent of the company, even though the application contained a stipulation that the agent took the application as the agent of the insured." Royal Neighbors of America vs. Bowman, 177 Ill., 27. "We think that Dr. Greer was the agent and representing the appellant in this examination, and notice to him of the facts and health of the deceased, acquired at the time of the examination, would be notice to the company. "Notice to the agent at the time of the application for the insurance, of facts material to the risk is notice to the insurer and will prevent it from insisting upon a forfeiture for causes within the knowledge of the agent." Provident Life Society vs. Cannon, 201 Ill., 280.

It is next insisted by counsel for appellant that at the May term, 1913, of said court, and after having heard plaintiff's evidence, in this case, and at the close thereof, the court permitted plaintiff to take a non suit to avoid the direction of a verdict for defendant; that the court erred in permitting the plaintiff at the same term of court to set aside the order of dismissal and re-instate the case for hearing. We understand the rule to be that it is within the discretion

of the court to set aside an order of dismissal and re-instate a case upon the docket at the same time, especially where it appears to the court that it is done in the interests of justice, and unless such discretion is abused, it cannot be assigned as for error. Combs vs. Steele et al., 80 Ill., 101. In a later case it is said, "In addition to what has been said above, after this cause was reinstated the appellant appeared and took part in the proceedings as before from the recitation of facts already made. It thereby waived its right to except to the order of the court reinstating the cause. After the cause was re-instated the appellant should not have appeared at all, or at most, should have confined itself to the resistance of any action proposed by the appellee." Grand Pacific Hotel Co. vs. Pinkerton, 217 Ill., 61. We are not furnished with the facts at that time in possession of the court upon which he permitted the order of dismissal to be set aside. One of the questions made by the motion was, that the court erred in the admission of testimony, and that if the order of dismissal was permitted to stand the suit would be barred, and that she was not at that time advised of the fact that there was a clause in the by-laws requiring action to be brought within one year from the date of the death. It is presumed that the court acted properly in this matter and had before him such facts as warranted him in setting aside the order. We are not convinced that the court erred in the setting aside of this order of dismissal.

It is next contended that the court erred in giving plaintiff's first and second instructions which informed the jury that if they believed from the evidence that at the

of the court to set aside an order of dismissal and re-
state's case upon the basis of the same facts, and
there is no reason to believe that it is in the public
interest to require the state to pay the costs of the
not be assigned as its error. *Donohue v. State*, 101 N.D. 101.
101. In a later case it is said, "The state is not
been said above, that this court has refused the
appeared and took part in the proceedings as a party
testimony of those already made. It is not the duty
to except to the order of the court setting aside the
After the same was returned the court as a matter of
appeared as a party, and the state is not bound to
the testimony of any witness proposed by the state. *State*
Ex rel. Hotel Co. v. Heston, 101 N.D. 101.
testimony of the state is not binding on the
court need not be admitted the order of the court to be
see said. One of the questions is whether the state is
the court order in the case of the state, and if it
order of dismissal is reversed the state is
parted, and that the state is not bound to pay the
that there was a change in the public opinion
be brought within one year from the date of the order. It is
presumed that the state acted properly in this matter and was
before him each time as it turned him in relation to the
order. It was not demanded that the state enter in the
any order of this order of dismissal.
It is not contended that the state entered in any
the state's case and was not satisfied with the
the jury that it may believe from the evidence that the

time the application offered in evidence was filled out by Dr. Greer he was medical examiner for defendant then any information obtained by him would be the same as the defendant. Complaint is also made of defendant's included instruction No. 1, which sought to advise the jury that by the contract the medical examiner was made the agent of the appellant. The principle controlling the giving of the two instructions for appellee and the refusal of the instruction for appellant has been fully commented upon in this opinion and we do not believe the court erred in giving the instructions for appellee and refusing the instruction for appellant.

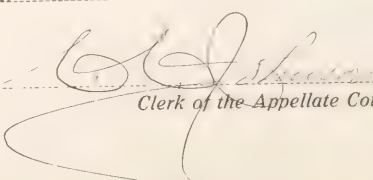
The evidence in this case is very conflicting and while it is true that the evidence of appellant taken alone is sufficient to defeat a recovery herein, it is also true that the evidence of appellee taken alone is sufficient to warrant a recovery, and the contradiction of the witnesses, the determination of whom was most worthy of belief, were matters for the consideration and determination by the jury and we cannot say that the verdict of the jury is so manifestly against the weight of the evidence as to require a reversal herein, and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

(Not to be reported in full.)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

194 I.A. 20

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

Hon. Harry Higbee, Justice.

✓ Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 20

ERROR TO
APPEAL FROM

Roman

vs.

No.

24

October Term, 1914.

Circuit

COURT

Madison

COUNTY

Schauer

TRIAL JUDGE

HON.

W. E. Hadley

Term No. 24.

Agenda No. 42.

October Term, A. D. 1914.

J. P. Borman,

Appellant,

vs.

Theo. J. Gebauer and

Bess J. Gebauer,

Appellees.

Appeal from

Madison Circuit Court.

McBride, P.J.

This was an action brought by appellant against appellees in the Circuit Court of Madison County, which resulted in a verdict and judgment for the appellees. The declaration consisted of a special count, declaring upon a note for six hundred dollars, bearing date of September 21, 1912, due ten months after date and payable to the order of A. B. Black, bearing interest at six per cent per annum, executed by the appellees. Also alleging an endorsement on July 1, 1913, by A. B. Black to Dr. F. W. Braner, and a further endorsement by Dr. F. W. Braner and delivered to the appellant. The declaration also contained the common counts.

~~It appears from the evidence in the case that on~~

August 5, 1912, A. B. Black purchased a butcher shop in Troy, Illinois, for a consideration of one thousand dollars, and in order to pay for the same borrowed the amount of six hundred dollars from the Troy Exchange Bank, giving his father-in-law, G. C. Bauer, as surety thereon. This note was ~~given August 5, 1912,~~ and payable one year after date, and to complete the payment for such shop said Black executed and delivered to one Ed Kline a chattel mortgage upon the fixtures, securing a note

October Term, A. D. 1911.

Appeal From

Appellant,

vs.

Theo. J. Gebauer and
Beas J. Gebauer

This was an action brought by appellant against appellees in the Circuit Court of Madison County, Illinois, which was decided in a verdict and judgment for the appellees. The action consisted of a special count, demanding judgment for six hundred dollars, bearing date of September 21, 1907, ten months after date and payable to the order of A. B. Black, bearing interest at six per cent per annum, reckoned at the appellees. Also alleging an endorsement on July 1, 1908, by A. B. Black to Dr. F. W. Brannen, and a further endorsement by Dr. F. W. Brannen and delivered to the appellees. The action also contained the common count.

It appears from the evidence in the case that on August 2, 1912, A. B. Black purchased a lot of land in Troy, Illinois, for a consideration of one thousand dollars, and in order to pay for the same borrowed the sum of the hundred dollars from the Troy National Bank, giving his personal note to G. C. Bauer, as surety thereon. This note was dated August 2, 1912, and payable one year after date, and so complete the payment for such shop said Black executed and delivered to one Ed Kline a chattel mortgage upon the fixtures, securing a note

for four hundred dollars. A. B. Black continued in the butcher business for about sixty days, during which time he appears to have lost his life and determined to quit the butcher business, and sold the business to his brother-in-law, the appellee Theo J. Gebauer, for one thousand dollars. A new note and chattel mortgage was executed to Kline and was taken up. The appellee executed and delivered to A. B. Black a note for six hundred dollars, bearing date of September 21, 1912, due ten months after date for the amount of six hundred dollars, and payable to the order of A. B. Black. It is claimed by the appellee that this was given as what they termed a security note and that it was understood and agreed that the appellee Theo. J. Gebauer was to pay the note bearing date of August 5, 1913, for six hundred dollars heretofore described to the Troy Exchange Bank, take that note up and deliver it to Black, whereupon Black was to return to appellees the six hundred dollar note executed to them. It further appears from the evidence that before the note bearing date of September 21, 1912, became due, and on July 1, 1913, that A. B. Black sold and delivered this note to Dr. F. W. Braner for a valuable consideration and Braner thereafter transferred said note to the appellant for collection, upon which Appellant instituted this suit.

It is claimed by appellees that at the maturity of the note executed by Black et al. to the Troy Exchange Bank, that the appellee Theo. J. Gebauer paid this note to the bank and now claims that the note bearing date of September 21 and payable to A. B. Black was transferred to F. W. Braner after its maturity, and that by reason of this agreement with Black and the payment of the note bearing date of August 5th that

for four hundred dollars. A. E. Black, residing in the city-
of business for about three years, was the person who
to have been his wife and children in 1912 and 1913.
interest and the business to his brother-in-law, the
let them J. Bennett, for one thousand dollars. A note and
cheated mortgage was executed to him and was taken up. The
apparently executed and delivered to A. E. Black a note for six
hundred dollars, bearing date of September 21, 1912, due ten
months after date for the amount of six hundred dollars, and
payable to the order of A. E. Black. It is claimed by the
appellants that this was given as that they turned a security
note and that it was understood and agreed that the appellants
Theo. J. Gebauer was to pay the note bearing date of August 2,
1913, for six hundred dollars payable to the Troy
Exchange Bank. That the note was not delivered to the bank there-
upon Black was to return to appellants the six hundred dollar
note executed to them. It further appears from the evidence
that before the note bearing date of September 21, 1912, was
given, and on this 11th, Geo. J. Bennett was a resident of the
lives and was in the city of Troy, New York, and was the ap-
parent and direct representative of the bank for the ap-
pointed for collection. Geo. J. Bennett was the person who
sue.

It is claimed by appellants that the bank of
the note executed by Black to A. E. Black was taken up by the bank
that the appellants Theo. J. Gebauer was to pay the note to the bank
and was given to the bank and was taken up by the bank on the 11th
payable to A. E. Black was transferred to T. J. Gebauer after
its maturity and was in the hands of the bank at the time of the
and the payment of the note bearing date of August 2, 1913.

the note ~~here~~ sued upon ~~is~~ satisfied and should be surrendered to appellees. Upon the other hand, it is claimed by appellant that Dr. Braner purchased the note sued upon before its maturity for a valuable consideration without notice of any defense thereto, and that the defense offered by appellees is ~~not~~ not warranted and that he ~~is~~ is entitled to recover the full amount of the note. It is stated by counsel for appellant in his argument of this case that "In this case we believe the deciding of one point will control the court's decision of the case. That point is, "Was the note (plaintiffs Ex. A.) assigned by Black to Braner on July 1, 1913, or at any time before maturity? If it was so assigned there is absolutely nothing in the record on which appellees can stand." Counsel for appellees in their argument, after quoting the above statement made by counsel for appellant, say, "We thoroughly agree with that statement and believe, with them, that that is the only question in the case." We agree with counsel for appellant and appellees that the controlling question in this case is, Was the note transferred by endorsement to Dr. Braner before its maturity? If so, the appellees can have no defense thereto. It is claimed by counsel for appellees that this is a question of fact to be determined by the jury and that as the jury has decided in appellees' favor that the verdict and judgment should not be disturbed. We agree with counsel for appellees that this is a question of fact to be determined by the jury but this determination must be made upon competent evidence and we think the serious question here is, Is there any competent evidence upon which the jury could have determined that this note was transferred to Dr. Braner after its maturity? It is provided by statute, "Except where an endorse-

The note was then upon a sealed and should be surrendered
 to appellants. Upon the other hand, it is claimed by appellants
 that Dr. Branner purchased the note and upon a loss the note
 is for a valuable consideration without notice of any
 person thereto, and that the defense offered by appellants is
 not warranted and that he is entitled to recover the full
 amount of the note. It is stated by counsel for appellants in
 his argument of this case that "in this case we believe the
 deciding of one point will control the court's decision of
 the case. That point is, 'was the note (plaintiff Ex. A.)
 assigned by Branner to Branner on July 1, 1913, or at any time
 before maturity? If it was so assigned there is absolutely
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 for appellants in their argument, after stating the above state-
 ment made by counsel for appellants, say, 'a thoroughly ques-
 tion with that statement and believe, with them, that this is the
 only question in the case.' We agree with counsel for appel-
 lants and appellants that the controlling question in this case
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 fore its maturity? If so, the appellants can have no defense
 thereto. It is claimed by counsel for appellants that this is
 a question of fact to be determined by the jury and that the
 the jury has decided in appellants' favor that the record and
 judgment should not be disturbed. We agree with counsel for
 appellants that this is a question of fact to be determined by
 the jury but this determination must be made upon competent
 evidence and we think the serious question here is, is there
 any competent evidence upon which the jury could have deter-
 mined that this note was transferred to Dr. Branner before its
 maturity? It is provided by statute, 'Exempts there an endorse-

ment bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue." Hurd's Revised Statute, Chap.

98, Sec. 63. And this doctrine has been sustained by repeated decisions of our Supreme and Appellate Courts. The only evidence offered by appellees for the purpose of showing that the note in question was transferred after maturity was the testimony of the witness H. C. Kersey who says that at Mr. Gabauer's request he went, on August 30th to see Mr. Black about delivering to Black the note that appellees had paid to the Troy Exchange Bank in exchange for the note in question, and that Mr. Black then stated, "He told me there was some other matters between him and Mr. Gabauer had to be settled before he would give up the note." Also the testimony of Mrs. Chawen Gebauer, who says that on about July 18, 1913, Black said he would turn it over to Theo. ^{Gebauer.} She was then asked the question, "Q.-- You didn't know where the note was at the time? A.-- It was in his possession I think because he said it was. Q.-- I say, do you know whether it was? A.-- I don't know. He told me he had it, that is all I can tell you." And the further testimony of H. C. Kersey, who says that on Monday September 1, 1913, "I went down and notified Dr. Braner, telling him that note had been paid and we demanded the other note and I says this is security for the other note and he asked me if the bankers knew it, I said "sure", that was all that passed between us. I told him the note I was talking about." Witness also says ^{was} this is all that was said by Braner.

This is the whole of the testimony introduced by appellees to prove that the note was transferred after maturity. The presumption of law is, and the testimony of Dr. Braner and Mr.

and bear testimony after the testimony of the witnesses, every
 negotiation is deemed prima facie to have been effected before
 the testimony was given. The testimony of the witnesses is
 not to be taken into consideration by the jury. And this doctrine has been sustained by the
 United States Supreme Court in the case of the United States v. Gurnea. The
 only evidence offered by appellants for the purpose of showing
 that the note in question was transferred after maturity was
 the testimony of the witness H. G. Vetterly who says that he
 at Gabauer's request he went, on August 30th to see Mr. Black
 about delivering to Black the note that appellants had; and to
 the Troy Exchange Bank in exchange for the note in question,
 and that Mr. Black then stated, "He told me there was some
 other matters between him and Mr. Gabauer had to be settled
 before he would give up the note." Also the testimony of Mrs.
 Gabauer, who says that she was with her husband at the time
 said he would turn it over to Theo. Black, and then asked the
 question, "Q.-- You didn't know where the note was at the
 time? A.-- It was in his possession I think because he was
 it was. Q.-- I say, do you know whether it was? A.-- I don't
 know. He told me he had it, that is all I can tell you."
 And the further testimony of H. G. Vetterly, who says that on
 Monday September 1, 1913, "I went down and notified Dr. Bremer,
 telling him that the note had been paid and he demanded the other
 note and I gave him a receipt for the other note and he
 asked me if the bankers knew it, I said "yes", that was all
 that passed between us. I told him the note I was talking
 about." "Witness also says that this is all that was said by Bremer.
 This is the whole of the testimony introduced by appellants to
 prove that the note was transferred after maturity. The pre-
 sumption of law is, and the testimony of Dr. Bremer and Mr.

Black is that the note was transferred for a valuable consideration on July 1, 1913, and before its maturity. Mr. Black is not a party to this suit and it was error to prove in chief, as they did do, by the witnesses Kersey and Mrs. Gebauer, declarations or statements made by Black without first showing ~~that~~ ~~the note~~ the note had not been transferred at the time. It is said that Black testified that he had the note but the witness does not claim that she saw the note, but has only the declaration of Black for it. This was surely incompetent. Appellant would not be bound by any declarations or admissions made by Black after he had transferred the note, and while it is claimed that he said he had the note, that is after all but a declaration and not the proof of an existing fact, and in the admission of this testimony over the objections of counsel for appellant we think the court erred and without this testimony there is nothing in the record to show that the note was assigned after its maturity. ~~It is true~~ Constable Kersey testified that he saw Dr. Braner on September 1st and notified him not to purchase the note but ~~does~~ ^{did} not claim that Dr. Braner said anything; ^{He} simply ~~says~~ ^{said} that he told Braner not to purchase the note, that it had been paid, and he simply asked if the bankers knew it, and ~~says~~ ^{said} that was all that passed between them. We are of the opinion that there is nothing in this that in any manner compromises the rights of Dr. Braner, and while it is argued that Dr. Braner when told not to purchase the note said nothing and that this should be taken as a circumstance against him; a slight circumstance of this character, even if it tended to establish that he was not then the owner of the note, should not be allowed to prevail over the presumption of law and the testimony of Braner and Black, both of

[illegible]

Braner and Black
shon stated positively that the note was transferred and assigned by Black to Braner on July 1, 1913.

There is nothing in the contention of counsel for appellees that the appellant would not have a right to institute suit upon this note where it was indorsed to him by Dr. Braner for collection, as he was certainly vested with the legal title to this note and had the right to sue thereon. Ill. Conference vs. Plagge, 277 Ill., 431. The second assignee, even though received by him after maturity, is entitled to the same protection as the first assignee if the first assignee had received the note before its maturity, and is entitled to succeed to all the rights for the enforcement of the collection, and no defense can be urged against the note in his hands not admissible against the first assignee. Matson et al. vs. Alley, 151 Ill. 284.

There are other matters discussed by counsel in the argument of this case but in our view and in the view expressed by counsel for both parties herein in which they agree that the question above determined is the controlling matter in the case, we deem it unnecessary to discuss the other questions, and for the reasons above indicated we are of the opinion that the court erred in admitting such evidence and that the verdict of the jury is manifestly against the weight of the evidence, and the judgment of the lower court is reversed and the cause remanded.

REVERSED AND REMANDED.

(Not to be reported in full.)

them stated positively that the note was transferred and re-
signed by Black to Bunker on July 1, 1910.

There is nothing in the contention of counsel for
appellants that the appellant could not have a right to in-
stitute suit upon this note where it was indorsed to him by
Dr. Bunker for collection, as he was originally vested with
the legal title to this note and had the right to sue there-
on. It is contended that the note was assigned to the
appellee, even though received by him after maturity, is en-
titled to the same protection as the first assignee if the
first assignee had received the note before its maturity, and
is entitled to succeed to all the rights for the enforcement
of the collection, and no defence can be urged against the
note in his hands not available against the first assignee.

It is further contended that the note was assigned to the

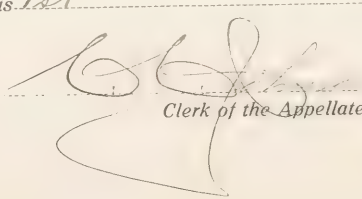
appellee. There are other matters discussed by counsel in the
argument of this case but in our view and in the view of the
jury for both parties herein in which they agree that
the question above determined is the controlling matter in the
case, we deem it unnecessary to discuss the other questions,
and for the reasons above mentioned as to the opinion that
the court erred in admitting such evidence and that the ver-
dict of the jury is manifestly against the rights of the ap-
pellee, and the judgment of the lower court is reversed, and the
case remanded.

WILLIAM H. HARRIS, JR.

(Not to be reported in full.)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

NON

715

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 29

ERROR TO
APPEAL FROM

No. 37 vs.
October Term, 1914.

COURT

COUNTY

TRIAL JUDGE

HON.

J. R. Brighten

Term No. 37.

Agenda No. 13.

October Term, A. D. 1914.

Ulysses Hutson,)	
Appellee,)	
vs.)	Appeal from the
Charles D. Platt,)	Circuit Court of
Appellant.)	Franklin County.

McBride, P. J.

Appellee recovered a judgment against appellant in the Circuit Court of Franklin County, for the amount of six hundred dollars, to reverse which judgment this appeal is prosecuted.

~~It appears from the record in this case that~~ On the morning of August 19, 1913, the appellee, with his wife, was traveling on the public road leading north from Christopher in Franklin County, in a top buggy drawn by one horse. The appellant was traveling south on the same road, riding on a motor cycle. They met upon the road at the distance of about one mile from Christopher; the road at this place is narrow, of the width of twelve to fifteen feet, crossed by a stream over which is erected a bridge fifteen or twenty feet wide. At the right of the road is a ditch eighteen or twenty inches deep. At about the time appellee crossed the bridge in question going north, the appellant was coming south on his motor cycle and at this point passed appellee when appellee's horse became ~~fixly~~ frightened, jumped to the right of the road, ran the buggy into the ditch above described, and threw the appellee and his wife from the buggy and injured appellee.

October Term, 1884.

Attorney for the
Plaintiff in Error,
Franklin County.

Ulysses Watson,
Appellee,
vs.
Charles D. First,
Appellant.

WITNESSES:

Appellee recovered a judgment against appellant in
the Circuit Court of Franklin County, for the amount of six
hundred dollars, to which judgment this appeal is
presented.

It appears from the record in this case that on the
evening of August 12, 1882, the appellee, with his wife, was
traveling on the public road leading north to Christopher
in Franklin County, in a wagon drawn by one horse. The
appellee was traveling south on the same road, riding on a
motor cycle. They met upon the road at the entrance of about
one mile from Christopher; the road at that place is narrow,
of the width of twelve to fifteen feet, crossed by a fence
over which is stretched a single wire, and is only four feet
at the right of the road is a ditch eighteen to twenty inches
deep. At about this place appellee crossed the fence in direc-
tion going north, the appellee was coming south on his motor
or cycle and as this horse passed appellee then appellee's
horse became much frightened, jumped to the right of the
road, ran the buggy into the ditch above mentioned, and threw
the appellee and his wife from the buggy and injured appellee

to recover damages for which injury this suit ^{was} brought. It ~~was~~ claimed by appellee that at the time appellant passed him that he was driving his motor cycle at a speed of from twenty-five to forty miles an hour, and that just about the time appellant was opposite the horse of appellee that appellant sounded his whistle or gong and frightened the horse and caused it to throw the buggy into the ditch. The appellant denies that he was running his motor cycle at an excessive speed or that he blew the whistle when opposite appellee's horse, and denies that he did anything to frighten the horse.

The declaration in this case consists of two counts. The first count charged that the appellant operated and drove his motor cycle outside the limits of any incorporated city, village, or town at a rate of speed that exceeded twenty-five miles per hour, and which rate of speed was then and there greater than was then and there reasonable and proper and so as to endanger the life and limb of the plaintiff and contrary to the form of the statute in such case made and provided, and in consequence thereof frightened plaintiff's horse and caused it to jump to the right side of the highway and by means thereof the buggy was thrown into the ditch, overturned and injured plaintiff. And alleges that plaintiff was at that time in the exercise of due care for his own safety.

The second count alleges that the appellant carelessly, negligently, improperly and wrongfully operated, used and drove and rode the said motor bicycle or motor vehicle, that the said horse became frightened, overturned the buggy and injured plaintiff. To this defendant filed a plea of general issue. The appellant contends that he is not liable for

this injury and argues such contention under several different propositions but they are all covered in the proposition that the defendant was not guilty of the negligence charged, that the appellee failed to prove negligence by a preponderance of the evidence, and that the appellee was not in the exercise of due caution for his own safety at the time of the injury complained of.

The evidence in this case is very conflicting and taking the evidence as offered by appellee alone it is sufficient to warrant a verdict in his behalf, and taking the testimony as offered by appellant alone it is sufficient to bar appellee from a recovery. The statute provides, Sec. 269 J, Chap. 131, Hurd's Revised Statute that, "No person shall drive a motor vehicle or motor bicycle upon any public highway in this state at a speed greater than is reasonable and proper having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person." It is also provided by Sec. 269 Q, of the same statute, that, "Nothing in this Act shall be construed to curtail or abridge the right of any person to prosecute a civil action for damages by reason of injuries to person or property resulting from the negligent use of the highways by the driver or operator of a motor vehicle or motor bicycle or its owner or his employe or agent, and in any action brought to recover any damages for injury either to person or property caused by running any motor vehicle or motor bicycle at a rate of speed greater than is reasonable and proper, having regard for the traffic and the use of the way, or so as to endanger the life or limb or injure the property of any person, the plaintiff or plaintiffs shall be deemed to

THE APPEAL WAS DENIED.

[illegible]

have a prima facie case by showing the fact of such injury and that the person or persons driving such motor vehicle or motor bicycle was at the time of such injury running the same at a speed greater than was reasonable and proper having regard for the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person."

As we view the law and the declaration filed in this case, if the appellant was driving his motor vehicle upon the public highway at a speed greater than is reasonable and proper, having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person, or if the appellee's injuries resulted from the negligent use of the highway by the driver or operator of the motor bicycle, that in such case a liability would accrue to the appellee for injuries sustained, if he was in the exercise of due care for his own safety. | The evidence of the appellee is-

that appellant was driving his motor cycle upon the public highway, which was narrow, with a ditch eighteen or twenty inches deep on one side of it, at a speed from twenty-five to forty miles per hour, and that just as appellant came opposite the head of appellee's horse that he sounded his whistle which made an uncommon noise, scared appellee's horse and caused it to over-turn the buggy and injure appellee. He is corroborated to some extent by Walter Summers who says, "It was not long after I heard the whistle, a second or two, until I heard the noise of the buggy turning over. When I looked around the buggy was turned over in the fence." Appellant says he did not blow the whistle at that time but that the last time that he blew it was on top of the hill about the distance of one hundred fifty yards from where the injury occurred. | If that

is true then Summers is mistaken about having heard it blow but a second or two before he saw the buggy turned over, and we think the evidence tends at least to show that Summers did not hear the whistle sounded at the top of the hill but heard it there by the buggy. ~~and~~ ^{was} ~~corroborated~~ ^{corroborated} in his statement by the testimony of Jesse Hutchins who says he heard him blow the whistle at the top of the hill but that he did not blow it any more. The testimony of appellee that appellant was running his machine at from twenty-five to forty miles an hour has some slight corroborating circumstances supporting it, and the testimony of appellant that he was running at a slow rate of speed is corroborated, at least in part, by the testimony of Jesse Hutchins who says that he could have run by his side as the machine went down the hill. The evidence of appellee tended to show that his horse was quiet and gentle and could be driven by a man or woman and not liable to become frightened so as to run away or injury any one, and there is evidence tending to show that the horse was scarey and on a few occasions had become frightened to some extent at automobiles and motor cycles. These, however, were all questions of fact to be determined by the jury and where the evidence is conflicting, as it is in this case, we do not feel that we can say the verdict of the jury was manifestly against the weight of the evidence, and unless we can, we have no right to disturb the verdict and this proposition has been decided over and over again by the Appellate and Supreme Court of this State. It is conceded by counsel for appellant in the course of his argument that this is a question of fact. The jury is empanelled for the purpose of trying questions of

fact that arise in the trial of a case. They observe the witnesses while upon the stand, their demeanor, and have a much better opportunity to determine who is telling the truth than we have from this record. The questions of negligence and due care are always matters to be determined by the jury, under proper instructions given by the court, and the court having properly instructed the jury in this case, the finding of the jury upon these questions should not be lightly disturbed. These questions of fact have been passed upon by the jury and by the trial Judge and we can see nothing in the record that warrants us in saying that the verdict is manifestly against the weight of the evidence, and we believe we have no right to disturb the finding of the jury, and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

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(Not to be reported in full.)

fact that arise in the trial of a case. They receive the
evidence which is presented, they determine, and have a
right to be heard. It is for the jury to determine the facts
and to give them their effect. The question of guilt
and the case is always to be determined by the jury.
Under proper instructions given by the court, and the jury
properly instructed the jury in this case, the finding
of the jury upon these questions should not be lightly dis-
turbed. These questions of fact have been passed upon by the
jury and by the trial judge and we can see nothing in the re-
cord that warrants us in saying that the verdict is contra-
dictory against the weight of the evidence, and a finding of fact
no right to disturb the finding of the jury, and the find-
ing of the lower court is affirmed.

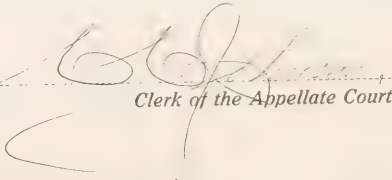
REVEREND JUSTICE

IN SENATE

(NOT TO BE PRINTED IN BLUE)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

NOIN

94 A 48

719

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 48

ERROR TO
APPEAL FROM

vs.

No.

12

October Term, 1914.

COURT

COUNTY

TRIAL JUDGE

HON.

Louis Bernhardt

M. L. Ry. Co.

Washington

Seymour

Circuit

October Term, A. D. 1918.

Thomas Seymour,
Appellee,
vs.
Illinois Southern Railway
Co.,
Appellant.

Appeal from
Circuit Court of
Washington County.

Opinion by Harris, J.

This case was remanded and re-docketed in the Circuit Court. The trial was upon an amended declaration consisting of four counts. The first and fourth amended counts were amended ~~substantially~~ amended when said amended declaration after the formal averments in substance charged:

The first amended count avers that appellant's servants ran the engine over the teaming track without any warning or signal whatever of its approach and as a result the appellee received the injury.

The second amended count avers that appellant's servants ran the engine at a high rate of speed, viz., twenty miles an hour over the teaming track, in consequence of which the engine collided with the horse of the appellee and threw the horse against appellee injuring him and killing the horse.

The third amended count charges that the servants of appellant wantonly and recklessly drove the engine at an unlawful rate of speed and in consequence of the wanton and reckless conduct of said servants the injury was inflicted.

The amended fourth count avers that the servants of appellant drove the engine over the teaming track without

any notice or warning of its approach and thereby frightened the horse of appellee and caused him to move, whereby the horse was struck by the engine and thrown against a wall. A plea of not guilty was filed to this amended declaration, a trial, upon the issues so joined, resulted in verdict and judgment for appellee in the sum of \$800.00.

The issues upon which the case was heard and the evidence is practically the same as at a former hearing of the case which was appealed to this court and reported in 173 Ill. App., 3435, from which we adopt the statement of facts and opinion so far as applicable to this appeal: "It appears from this record that in April, 1910, appellant was operating its railroad which passed east and west through the north limits of the City of Nashville. Depot street extends north from the public square of said city, upon or near which appellant's depot is located. East of this street one block, and running parallel with it, is Mill Street. Defendant's road intersects these streets, the former at or near its switch extending from west of Depot street east across Mill Street and to the Hughey mills located five or six hundred feet east of Mill street. The track at some point between Depot street and the mills, curves to the northeast; this side track was used by persons transacting business with the defendant, as a place for loading and unloading freight into and out of wagons. On April 1st, appellee was engaged in unloading stone from a car standing upon this track, and in connection with such unloading he was using a team and had in his employ a man by the name of Jones who assisted him in unloading the stone from the car on to the wagon; appellee

any notice or warning of its removal and thereby rendering the house of appellee and caused him to move, whereas the house was struck by the engine and there was no evidence of not guilty was filed to this material consideration, a jury upon the issues as framed, resulted in verdict and judgment for appellee in the sum of \$200.00.

The issues upon which the case was heard in the evidence is practically the same as in the trial court. The case which was appealed to this court and reported in 173 Ill. App. 3d 323, 170 Ill. App. 3d 323, facts and opinion so far as applicable to this case. It appears from this record that in April, 1910, appellee was operating his railroad which passed east and west through the north limits of the City of Chicago. About 1910, the north line of the public square of said city, north of said street, appellant's house was located. East of this street and south and running parallel with it is Mill Street. Between the road intersects these streets, the town of Chicago is a strip extending from east of Depot Street to west of Mill Street and to the Highway. This located five or six hundred feet east of Mill Street. The street at some point between Depot Street and the Mill Street, crosses the railroad and the side track was used by persons transacting business with the defendant, as a place for loading and unloading freight cars and out of yards. On April 1st, 1910, appellee was engaged in loading some cars and was standing near the street, and in connection with such unloading he was using a team and in his employ a man by the name of Jones. He was in the unloading the cars from the box on the street.

was using two wagons and his team of horses. While these loaded one wagon appellee would take the other wagon loaded with stone and deliver it, come back and leave the empty wagon and change his team of horses to the loaded wagon. At five o'clock in the afternoon, and while plaintiff was away with one of the wagons, a freight train of appellant was in on its main line, unhooked the engine from the train and ran on to the switch and pushed the car of stone back to the mill some six or seven hundred feet distant from where appellee and his assistant had been engaged in the unloading of stone from the car on appellant's road. That while appellee was gone with this wagon Jones, the assistant, had loaded the wagon that had remained, and about the time that he had completed the loading of this wagon the engine pushed the car back to the mill, ~~above referred to.~~ That while the engine was at or near the mill and around a curve appellee returned with his empty wagon and finding the other wagon loaded unhooked his team and drove the horses over the tongue of the loaded wagon and after driving his horses across the tongue he was at their heads attempting to fasten the neckyoke upon the horse nearest to the track, his assistant at the same time was engaged in hooking the horses up to the double-trace, and at this time the engine approached from the mill end, as it passed by, the tank beam struck the horse nearest the switch upon the rump and threw the horse forward several feet, and in moving forward the horse struck plaintiff and injured him. The wagon stood some two or three feet away from appellant's track and far enough to clear the cars as they passed by.

~~The evidence also shows that the pilot beam on the~~

was using two wagons and one team of horses. "While I was
loaded one wagon my line would take the other wagon in the
with stone and deliver it, come back and leave the wagon
wagon and change his team of horses to the loaded wagon. At
five o'clock in the afternoon, and while I waited at the
in one of the wagons, a freight train of six engines
on the main line, unhooked the engine from the train and
on to the switch and backed the car of stone back to the mill.
some six or seven hundred feet distant from the mill.
and his assistant had been engaged in the unloading of stone
from the car on applicant's track. That while applicant was
gone with this wagon Jones, the assistant, had loaded the
wagon that had remained, and about the time that he had com-
pleted the loading of this wagon the engine backed the car
back to the mill. As the engine returned to the mill, the engine
was at or near the mill and a group of men gathered around
with his empty wagon on a siding the other wagon loaded and
hooked his team and drove the wagon to the engine at the
loaded wagon and after driving his horses drove the wagon
he was at their heads attempting to backen the wagon when
the horse nearest to the track, the assistant at the
line was engaged in hooking the horses up to the wagon, and
and at this time the engine approached from the mill and
it passed by, the back passed across the horse and the
switch upon the track and three horses fell and were killed.
and in moving forward the horse struck applicant's wagon
him. The wagon stood some two or three feet from the
applicant's track and far enough to clear the cars as they

used by.

The witness testified that the first horse was killed.

engine extended out over the tracks the same distance as the tender beam, and was of the same height from the ground. The pilot beam passed the horse without striking him, and ^{stated} the fireman ~~says~~ that between the time the pilot beam passed the horse and the tender beam reached it that the horse turned his rump towards the engine, and that caused the tender beam to strike him. The horse was a grey one and grey hairs were afterwards found upon the tender beam. There is a conflict in the evidence as to the speed at which the engine was running at that time. The witness Jones fixed it at twenty miles an hour, while other witnesses fixed it from five to eight miles, and others from ten to fifteen miles an hour. There ~~is~~ ^{was} also a conflict as to whether or not the employee of appellant blew the whistle or rang the bell.

Appellant argues five errors for a reversal of this case:

1st. Exclusion of proper evidence offered by appellant.

2d and 3d. Refusal of peremptory instructions.

4th. That the damages are excessive.

5th. That motion for new trial should have been allowed.

The five errors argued can be determined under the fifth, "That the motion for new trial should have been allowed." We again quote from our former opinion in this case, on page 339.

Much of the evidence and the discussion of counsel is devoted to the question as to whether or not appellant's servants sounded the bell or blew the whistle as it approached

section referred out over the bridge and was directed to the
 tender beam, and one of the men helped from the ground. The
 first man passed the horse without stopping and the
 fireman says that between the time the first beam passed the
 horse and the tender beam reached it that the horse began
 his jump towards the engine, and that caused the tender beam
 to strike him. The horse was a first one and first horse was
 afterwards found upon the tender beam. There is no doubt
 in the evidence as to the speed at which the engine was moving
 along at that time. The witness James Lloyd is not sure
 as to how, while other witnesses think it was five or
 eight miles, and others two or three miles. There is also a conflict
 of opinion as to whether it was before or after the engine
 of the engine.

1st. Evidence of proper witnesses referred to in
 2d. Evidence of proper witnesses referred to in
 3d. That the engine was moving.
 4th. That the engine was moving.
 5th. That the engine was moving.
 The first error referred to in the evidence is that
 1st. That the engine was moving.
 2d. That the engine was moving.
 3d. That the engine was moving.
 4th. That the engine was moving.
 5th. That the engine was moving.
 The first error referred to in the evidence is that
 1st. That the engine was moving.
 2d. That the engine was moving.
 3d. That the engine was moving.
 4th. That the engine was moving.
 5th. That the engine was moving.

the place where appellee was engaged at his work. As we understand the law, the appellant did not under the statute owe the appellee, situated where he was, the duty of sounding the bell or blowing the whistle. The statute requiring the appellant to ring the bell and blow the whistle, for the distance of eighty rods before reaching a highway crossing, was not intended as a duty towards people who were at the side of the railroad, whether lawful or unlawful. We think that appellee was lawfully at the place where he was engaged in work and had a right to be there but this statute was enacted for the protection of persons upon the public highway that were about to cross the railroad or enter upon its crossing, and for passengers. It is said in the case of *Williams v. Chicago Railroad Company*, 135 Ill., 481, "That unless the injured person was upon a public highway or was a passenger upon the train, the railroad company owed him no duty to ring the bell or sound a whistle as required by statute, and he could not hold the railroad company liable for the failure to perform the statutory duty because the company had violated no duty which it owed him." And this same doctrine was announced in the case of *Illinois Central Railroad Company v. Richer*, 202 Ill., 556, and in the case of *Thompson v. C. C. & St. L. R. R. Co.*, 236 Ill., 543. The appellee was not upon the public highway, he was not about to enter the public highway for the purpose of crossing the railroad, and as we view the law he had no right to invoke the duties enjoined upon the appellant by this statute.

It is insisted by counsel for appellee that the acts of the defendant were not only negligent but were intentional.

and killed, and that by reason of said defendant's servants' inattention, reckless and negligent operation of said train at a dangerous rate of speed and failing to ring the bell and blow the whistle the appellee was injured. The witnesses were at considerable variance in their estimation of the speed at which the engine was being operated. Mr. Jones, who saw the engine but for an instant, and, ~~as we think~~, was not in a very good position to say how fast it was running, estimated the speed at twenty miles per hour, while Brandhorst, another witness of appellee, fixed the speed at from ten to fifteen miles per hour, and these were the only witnesses of plaintiff that claimed to be able to fix the speed, while the fireman McKelvey, fixed it at five miles per hour and Burgoyne, five or six miles per hour, and Lynn and Henderson each fixed it at about five miles per hour. They were connected with the operating of the train. Believing as we do, that Jones was not able from his observation, as he says, "the whole thing was done in a dash," to determine with any degree of accuracy the rate of speed at which the train was being operated, we are satisfied that it could not under this testimony have been running to exceed ten or fifteen miles per hour, as estimated by plaintiff's witness Burgoyne. It also appears to us that the rate of speed could not have had very much to do with the knocking of the horse against the plaintiff, for whether the train was running eight miles an hour or ten miles an hour and struck the horse as it did it would have the effect to knock him forward, and the thing that caused the engine to strike the horse was the fact that between the time the pilot beam passed him and the tender beam reached him he

turned his rump towards the engine and this caused the trouble. To agree with the contention of counsel for appellee that he was lawfully upon the premises of appellant, and appellant owed him the duty not to wantonly or wilfully or even negligently injure him and if it did a liability would then accrue. It is said by appellee in his brief, "At any rate the failure to apprise the appellee of the approach of the engine by sounding a bell or blowing a whistle is nothing short of recklessness or wantonness, and words are inadequate to properly characterize such conduct on the part of appellant's servants in view of the public nature of the place and the business connected therewith." By this it will be seen that in arriving at their wantonness and recklessness, great reliance is placed upon the failure to give warning of the approach of the engine, but as we have stated above, this was not a duty enjoined by statute upon the part of the appellant towards the appellee and hence could have no weight in determining the question of wantonness. It is said by the Supreme Court of Illinois, in the case of Illinois Central Railroad Co. vs. O'Connor, 189 Ill., 566, "While it is true the Railroad Company was running its train at a greater rate of speed than allowed by the ordinance of the City of Chicago, yet that fact did not relieve the deceased from the character of ordinary negligence, nor can the speed of the train alone be regarded as furnishing a sufficient reason for holding that the injury was wilful or wanton." In the case of L. S. & M. S. R. R. Co. vs. Bodemer, 139 Ill., 606, the Supreme Court says, "That is meant by 'such gross negligence as evidences wilfulness?' It is 'such a gross want of care and regard for the rights of others

The court in *Bohater*, 133 Ill. 608, the Supreme Court says, "that in cases of such gross negligence as evidence of culpable negligence, it is not sufficient reason for holding that the injury was not caused by the negligence of the train alone as regarded the fact that the negligence of the City of Chicago, but that the negligence of the City of Chicago was a greater cause of injury than the negligence of the train." In the case of *L. E. & M. R. Co. v. Bohater*, 133 Ill. 608, the Supreme Court says, "that in cases of such gross negligence as evidence of culpable negligence, it is not sufficient reason for holding that the injury was not caused by the negligence of the train alone as regarded the fact that the negligence of the City of Chicago, but that the negligence of the City of Chicago was a greater cause of injury than the negligence of the train." In the case of *L. E. & M. R. Co. v. Bohater*, 133 Ill. 608, the Supreme Court says, "that in cases of such gross negligence as evidence of culpable negligence, it is not sufficient reason for holding that the injury was not caused by the negligence of the train alone as regarded the fact that the negligence of the City of Chicago, but that the negligence of the City of Chicago was a greater cause of injury than the negligence of the train."

are as to justify the presumption of wilfulness or wantonness' (2nd Thompson on Negligence, 1264, Sec. 52); it is such gross negligence as to imply a disregard of consequences or a willingness to inflict injury." Also see I. C. R. R. vs. Lerner, 202 Ill., 624.

It is said in the case of C. C. C. & St. L. R. R. v. Cline, 111 Ill., App., 420, "The acts so characterized must be the result of more than slight or ordinary negligence, (L. S. & M. S. Ry. v. Bodemer, supra); wilful negligence is a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another which duty the person owing it has assumed by contract or which is imposed upon the person by operation of law. It is an entire absence of care for the life of the person or property of others such as exhibits a conscious indifference of consequences." When this test is applied to the facts as disclosed by the record what is there in it to show a conscious indifference to the life or property of appellee? It is very clear that those operating the train did not see that the horse or the appellee were in danger, did not realize anything was liable to happen by passing by the team as the wagon and horses when seen by the servants of appellant were sufficiently distant from the railroad track to be out of danger, and as before stated, there was no danger and no accident could have happened had the horse not moved from the position he was in when first seen. This case is entirely different from that class of cases where a person is seen in peril or where a train is operated through a crowd of people at a high and reckless rate

negligence as to imply a disregard of consequences or a
(The Thompson on Negligence, 2d Ed., 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601

It is a fact in the case of U. S. v. Cline, 111 Ill. App. 2d 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

at speed."

Counsel for appellee still insist under his first ground that it was necessary for appellant in running over the crossing track to have given some warning or signal. Why should the Court or jury say such a burden was imposed on appellant? Appellee does not believe in that view of common law when the statutory signal was to be given. If he will, however, because he was of a place where cars were allowed and where persons were invited by appellant for the purpose, under its common law duty he was entitled to a warning or signal of the approach of the train. Appellee has presumed to know that a railroad track was a place of danger, and under the law applicable to him he could require of appellant only reasonable care under the circumstances to prevent injury. If under the evidence a failure to give a warning contributed to the injury, the jury would have the right to take into account the fact that no warning was given in determining the question of reasonable care under the circumstances. Appellee is not satisfied with this as a common law duty but insists that appellant in going over this crossing track at all times should not do so without giving a warning or signal. The law does not impose this burden upon appellant. The question then arises in the exercise of reasonable care of appellant, from the undisputed evidence would the sounding of the bell or whistle have avoided the injury. The appellee was a short distance from the track with team and wagon and so remained so have avoided injury until the front part of the engine had passed, neither he or his team were moving. The signal is either given because the law compels it to be given or because

[illegible]

some person or something is in danger. It is practically admitted he was in a place of safety as the engine approached.

The evidence under the second amended count as to the train being run at dangerous rate of speed. There is a conflict as to the rate of speed from ten to twenty miles per hour, the manifest weight thereof is that the engine was running ten to fifteen miles per hour. That law this speed has to do with the injury; from the undisputed evidence appellee and his horse a safe distance from the track, and as the engine passed, the horse turns his rump towards engine and is struck by the tender pushed against appellee and appellee injured, the speed of speed would have nothing to do with the cause of the injury, if anything only to the extent of it.

There has been enough said in the former opinion on the liability of appellant for caution and visual negligence under the third amended count.

The fourth amended count is the same as the first except that it also avers that the horse was frightened and that caused him to move. There is no evidence that the horse was frightened although he might have been if the warnings and signals had been given. The evidence uncontradicted shows that the horse was paying no attention to the engine.

Lastly comes the question of what to do with this case. The judgment was reversed by this court as being manifestly against the weight of the evidence. A second trial brought no additional evidence to support the verdict. If the case was reversed and remanded another trial would mean additional expense, and with all due consideration for the two verdicts rendered by as many juries we cannot approve a finding

on the facts in this record, and under the law, against appellant.

The judgment is therefore reversed with a finding of fact.

Reversed with finding of fact.

We make the following finding of fact to be incorporated in record and made a part of the judgment in this case.

1. The defendant, appellant, was not guilty of any negligence that contributed to the injury.

~~REVERSED WITH FINDING OF FACT~~

(Not to be reported in full.)

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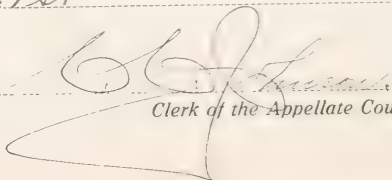
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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

94 A 58

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 58

Hostettler

~~ERROR TO~~
APPEAL FROM

vs.

No. 19

October Term, 1914.

Circuit COURT

Lawrence COUNTY

*Mushrush et al, School
Directors*

TRIAL JUDGE

HON. *E. E. Newlin*

Term 1914.

Agenda No. 5.

October Term, A.D. 1914.

J. H. Hostettler,

Appellee,

vs.

Ans. Mushrush and Henry Paddock,
School Directors of District
Number Sixty-eight of the County
of Lawrence and State of Illinois,
Appellants.

Appeal from
Circuit Court of
Lawrence County.

Opinion by Harris, J.

The appellee, a school teacher, files in the Circuit Court a declaration consisting of two counts in recompensit based upon an alleged contract with appellants in and by which in different language in the two counts he alleges that on May 1, 1913, he was a duly qualified teacher of said county for six months following September 1, 1913, and that at a regular meeting of appellant board on, to wit, the date aforesaid, he was regularly employed by appellants as principal of their public schools to teach the upper grades or advanced room thereof at a salary of Twenty-two & 50/100 Dollars per month for a term of six months, commencing September 1, 1913, and to be paid by appellants to appellee throughout and during the term of employment.

That appellants promised to receive him in said capacity September 1, 1913, but refused so to do although he was then and during said period of six months ready, able and willing to enter into the employment and so requested appellants to so receive him, which they refused to do. That thereby appellee was deprived of the profits and emoluments of said employment, also lost and was deprived of the means

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E. H. HOUGHTON

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of Lawrence and Grace of Illinois,
Kansas State Board of Education,
School Directors of Detroit,
for Muehrbach and Henry Pankajak.

[illegible]

and to be paid by the Government on a regular basis. The term of employment.

That accident related to police 100-100000

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and opportunity of being employed by other persons, and remained and continued wholly out of employment for the six months beginning September 1, 1913, to the damage of appellee of \$500.00.

To this declaration appellants filed plea of non-assumpsit. A trial by jury resulted in verdict for appellee for sum of \$412.50. Motion for new trial overruled. Judgment on verdict against School District and this appeal.

This appeal will be treated as a suit against School District Number 68 of Lawrence County, Illinois, although the title of the case and the declaration indicate it to be a suit against two of the directors individually, but the trial proceeded and judgment was entered against the District alone.

This District had constructed a school house of two rooms and prior to the year 1913 had employed two teachers. Sometime during the month of June, 1913, Appellee made application to the Directors for position as teacher. After his application was received a meeting of the directors was held on the front steps of the school house in the district. The time when the meeting was held is a matter of dispute. All the directors were present, it was dark and no other person except appellee and directors were present. After some discussion appellee contends he was hired by the board as principal to teach only the advance grades. The two directors named as appellants contend he was hired to teach the entire school. All ~~agrees~~ ^{was} to the amount to be paid ~~\$85.50~~ ^{was} per month and appellee to do his own janitor work for a term of ~~five~~ ^{or six} months. ~~That the minutes of this meeting were not~~ written until shortly thereafter, and no written contract at

and 10-15% of the total population of the country. The population of the country is estimated to be 10-15 million. The population of the country is estimated to be 10-15 million. The population of the country is estimated to be 10-15 million.

The trial proceeded and judgment was entered against the State.

To Wm. C. ...

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that time ^{was} made and signed. Appellee contends ^{id} meeting was on the 14th day of June, 1913. Appellants claim ⁱⁿ that meeting was on the 17th day of June, 1913; ~~that~~ afterwards in July, 1913, Board met and approved minutes; ~~that~~ appellee was not present at this meeting; ~~that~~ about September 2, 1913, the Board and appellee again met when the dispute ^{was} as to whether appellee was hired as principal and to teach the advance grades ^{or} whether he was employed to teach the entire school. The two directors appellants contending for the latter and the appellee and one director contending for the former, as the contract. This dispute continued from that time to September 23, 1913, without an agreement being reached. Another teacher was employed after appellee had refused to enter into the contract contended for by two of the directors, and appellants, two directors, refused to receive and accept the services of appellee as contended for by him.

The issues in this case are issues of fact and narrow down to the proposition: ^{was whether} ~~was~~ appellee employed by appellants to teach as principal the higher grades, or was he employed to teach the entire school. Evidence was offered on this issue, Appellee and Director Mills for the first proposition, and the two directors named as appellants for the second proposition. The evidence of other witnesses as to the statements of these respective witnesses going to their credibility and the rules of evidence in the admission thereof should be accurately followed. The case had to be decided upon a sharp conflict of evidence and any error in the admission or rejection of evidence goes to the merits of the case. Appellants insist upon the ~~fact~~ ^{fact} of the admission of error as reversible error.

that time and signed. The first of these, dated 1912, was the first of the series. The second, dated 1913, was the second of the series. The third, dated 1914, was the third of the series. The fourth, dated 1915, was the fourth of the series. The fifth, dated 1916, was the fifth of the series. The sixth, dated 1917, was the sixth of the series. The seventh, dated 1918, was the seventh of the series. The eighth, dated 1919, was the eighth of the series. The ninth, dated 1920, was the ninth of the series. The tenth, dated 1921, was the tenth of the series. The eleventh, dated 1922, was the eleventh of the series. The twelfth, dated 1923, was the twelfth of the series. The thirteenth, dated 1924, was the thirteenth of the series. The fourteenth, dated 1925, was the fourteenth of the series. The fifteenth, dated 1926, was the fifteenth of the series. The sixteenth, dated 1927, was the sixteenth of the series. The seventeenth, dated 1928, was the seventeenth of the series. The eighteenth, dated 1929, was the eighteenth of the series. The nineteenth, dated 1930, was the nineteenth of the series. The twentieth, dated 1931, was the twentieth of the series. The twenty-first, dated 1932, was the twenty-first of the series. The twenty-second, dated 1933, was the twenty-second of the series. The twenty-third, dated 1934, was the twenty-third of the series. The twenty-fourth, dated 1935, was the twenty-fourth of the series. The twenty-fifth, dated 1936, was the twenty-fifth of the series. The twenty-sixth, dated 1937, was the twenty-sixth of the series. The twenty-seventh, dated 1938, was the twenty-seventh of the series. The twenty-eighth, dated 1939, was the twenty-eighth of the series. The twenty-ninth, dated 1940, was the twenty-ninth of the series. The thirtieth, dated 1941, was the thirtieth of the series. The thirty-first, dated 1942, was the thirty-first of the series. The thirty-second, dated 1943, was the thirty-second of the series. The thirty-third, dated 1944, was the thirty-third of the series. The thirty-fourth, dated 1945, was the thirty-fourth of the series. The thirty-fifth, dated 1946, was the thirty-fifth of the series. The thirty-sixth, dated 1947, was the thirty-sixth of the series. The thirty-seventh, dated 1948, was the thirty-seventh of the series. The thirty-eighth, dated 1949, was the thirty-eighth of the series. The thirty-ninth, dated 1950, was the thirty-ninth of the series. The fortieth, dated 1951, was the fortieth of the series. The forty-first, dated 1952, was the forty-first of the series. The forty-second, dated 1953, was the forty-second of the series. The forty-third, dated 1954, was the forty-third of the series. The forty-fourth, dated 1955, was the forty-fourth of the series. The forty-fifth, dated 1956, was the forty-fifth of the series. The forty-sixth, dated 1957, was the forty-sixth of the series. The forty-seventh, dated 1958, was the forty-seventh of the series. The forty-eighth, dated 1959, was the forty-eighth of the series. The forty-ninth, dated 1960, was the forty-ninth of the series. The fiftieth, dated 1961, was the fiftieth of the series. The fifty-first, dated 1962, was the fifty-first of the series. The fifty-second, dated 1963, was the fifty-second of the series. The fifty-third, dated 1964, was the fifty-third of the series. The fifty-fourth, dated 1965, was the fifty-fourth of the series. The fifty-fifth, dated 1966, was the fifty-fifth of the series. The fifty-sixth, dated 1967, was the fifty-sixth of the series. The fifty-seventh, dated 1968, was the fifty-seventh of the series. The fifty-eighth, dated 1969, was the fifty-eighth of the series. The fifty-ninth, dated 1970, was the fifty-ninth of the series. The sixtieth, dated 1971, was the sixtieth of the series. The sixty-first, dated 1972, was the sixty-first of the series. The sixty-second, dated 1973, was the sixty-second of the series. The sixty-third, dated 1974, was the sixty-third of the series. The sixty-fourth, dated 1975, was the sixty-fourth of the series. The sixty-fifth, dated 1976, was the sixty-fifth of the series. The sixty-sixth, dated 1977, was the sixty-sixth of the series. The sixty-seventh, dated 1978, was the sixty-seventh of the series. The sixty-eighth, dated 1979, was the sixty-eighth of the series. The sixty-ninth, dated 1980, was the sixty-ninth of the series. The seventieth, dated 1981, was the seventieth of the series. The seventy-first, dated 1982, was the seventy-first of the series. The seventy-second, dated 1983, was the seventy-second of the series. The seventy-third, dated 1984, was the seventy-third of the series. The seventy-fourth, dated 1985, was the seventy-fourth of the series. The seventy-fifth, dated 1986, was the seventy-fifth of the series. The seventy-sixth, dated 1987, was the seventy-sixth of the series. The seventy-seventh, dated 1988, was the seventy-seventh of the series. The seventy-eighth, dated 1989, was the seventy-eighth of the series. The seventy-ninth, dated 1990, was the seventy-ninth of the series. The eightieth, dated 1991, was the eightieth of the series. The eighty-first, dated 1992, was the eighty-first of the series. The eighty-second, dated 1993, was the eighty-second of the series. The eighty-third, dated 1994, was the eighty-third of the series. The eighty-fourth, dated 1995, was the eighty-fourth of the series. The eighty-fifth, dated 1996, was the eighty-fifth of the series. The eighty-sixth, dated 1997, was the eighty-sixth of the series. The eighty-seventh, dated 1998, was the eighty-seventh of the series. The eighty-eighth, dated 1999, was the eighty-eighth of the series. The eighty-ninth, dated 2000, was the eighty-ninth of the series. The ninetieth, dated 2001, was the ninetieth of the series. The hundredth, dated 2002, was the hundredth of the series.

First: The giving of the first and ninth instructions offered by appellee.

Second: The refusal of the Court to admit in evidence the letter of Miss Weaver to Henry Paddick of date July 17, 1913.

The first instruction offered by appellee and given reads: "The Court instructs the jury, that, if you believe from the greater weight of the evidence that the school directors of the defendant school district, employed the plaintiff to teach their school and agreed with plaintiff on the amount of wages to be paid him and that the plaintiff was able, ready and willing to perform his part of the contract and teach the school pursuant to such employment and was prevented from doing so by the directors or a majority of them of the defendant school district, and have not paid the wages agreed upon for the term of the contract, if a preponderance of the evidence shows such employment was so made, then you may find for the plaintiff and assess the plaintiff's damages at such amount, if any, as you find from the evidence, a preponderance shows plaintiff is entitled to."

This instruction purports to go to the merits of the case and calls for a finding of the jury for the breach of a contract in so far as stated in the instruction is denied by appellee, that is, "That he, appellee, was to teach their school." whereas his contention is that he was only to teach a part of it. Therefore the instruction does not enlighten the jury upon that proposition. There is no element stated in the instruction that is in dispute in this case. That he was employed, admitted. Amount to be paid admitted. The term of employment admitted. That he was prevented from

First: The give

tions offered by appellee.

Second: The refusal of the Court to admit in evi-

dence the letter of Miss Weaver to Henry T. Smith of the 10th

177 1913.

The first instruction offered by appellee and given

reads: "The Court instructs the jury, that, if you believe

from the greater weight of the evidence that the school dis-

tricts of the defendant school district, that the school dis-

trict to teach their school and engaged with plaintiff on the

amount of wages to be paid him and that the plaintiff was duly

ready and willing to perform the part of the contract and

teach the school pursuant to such engagement in the private-

ed from doing so by the directors or majority of the dis-

trict, and that the plaintiff, and have not been the wages to

be paid upon for the term of the contract, it is the duty of the

the evidence shows a valid engagement was made, then you

are to find for the plaintiff and award him the wages due.

Agree at each moment, if any, as you find from the evidence,

preponderance shows plaintiff is entitled to it.

This last instruction purports to go to the jury.

the case and calls for a finding of the jury for the plaintiff

of a contract in so far as stated in the instruction is not

nied by appellee, that is, "that the plaintiff, and have not

their school." "whereas his engagement is that he should

teach a part of it. Therefore the instruction that he should

lighten the jury upon that point. It is the duty of the

stated in the instruction that he is entitled to the wages.

That he was employed, and that he was engaged to teach.

The term of employment is not stated. The jury is to find

entering upon the employment as he contended for it, admitted. That he refused to enter upon the employment as appellants contended for admitted. That then was the purpose of this instruction; it did not in any way direct the attention of the jury to the question in dispute but on the contrary seemed, in so far as it mentioned employment, to adopt appellant's contention as to the contract and tell the jury if they believed it to find for the plaintiff. It is said that the instructions must be considered as a series, which is true. It is further said that appellant's given instruction number five tells the jury that unless they believe appellee was employed to teach principalship they must find for appellants. This is true and a correct statement of the law as applied to the issue. These two instructions must not only be considered as a series but must be harmonious and not misleading. The one instruction tells the jury they must find for appellants unless appellee has proven he was employed to teach the principalship. And the other tells that he, appellee, may recover if he has proven he was employed to teach their school. There is no harmony and the instruction is misleading and authorizes the jury to find for him under either theory of the case.

The ninth instruction will not be set out in full but aside from giving the jury an abstract proposition of law that one promise is a good consideration for another promise is the same in effect as number one above quoted and is for the same reasons erroneous and should not have been given.

~~We come now to refusal of the court to admit in~~^{refused}
evidence the letter of Miss Weaver, a witness for appellee, and an applicant for teacher in the primary room. Miss Weaver

entirely upon the evidence in the case. It is not
tended for admission. That there was the possibility of this in-
struction; it did not in any way affect the instruction of the
jury to the question in dispute but on the contrary was a
so far as it mentioned employment, to show that the
instruction as to the contract and tell the jury if they believed
it to find for the plaintiff. It is said that the inst-
ructions must be considered as a series, which is true. It is
further said that each of the given instructions must be
tells the jury that unless they believe otherwise an employer
to teach principalship they must find for the defendant. This
is true and a correct statement of the law as applied to the
issue. These two instructions must not only be considered
as a series but must be harmonious and not conflicting. If
one instruction tells the jury they must find for the plaintiff
unless appellee has proven he was employed to teach the prin-
cipalship. And the other tells that he was not, they must
cover it if he has proven he was employed to teach in some other
There is no harmony and the instruction is defective and
authorizes the jury to find for him unless they believe of

The ninth instruction is not as set out in the
but since from giving the jury an opportunity to
law that one promise is a good consideration for another prom-
ise is the same in effect as saying one must promise to
for the same reasons reasons and should not have been given.
The court is of the opinion that the instruction is defective
evidence the letter of Miss Weaver, written for the plaintiff,
and an affidavit for teacher in the primary school. Miss Weaver

had testified to a conversation at the home of Mrs. Liddle with Henry Paddick in which she said that Mrs. Liddle said that she heard that he had hired Mr. Hosttettler for advanced room and he said, "Yes, I think we have done well," etc. Mr. Paddick denied that he told Mrs. Liddle they had hired a principal and, as tending to corroborate his statement as to what occurred and ^{to} discredit the evidence of Miss Weaver produced and offered in evidence a letter from Miss Weaver to him of date July 17, 1913, and identified by witness Weaver, a letter written and received after this meeting at the Liddle home, which letter is in substance, as follows:

Henry Paddick,

Channoccy, Ills.

Dear Sir:

Have you hired a teacher for the primary room for this winter or is it your intention to have only one teacher? Please let me know as soon as possible.

Respectfully,

Mae Weaver,

Clay City, Ills.

The evidence of this conversation was admitted but the objection to the letter was sustained. These witnesses did not agree as to what was said and a letter written by one of them afterwards to the other upon the subject matter is competent, admissible and material evidence as going to the credibility and weight to be given evidence of Miss Weaver and it was error to exclude it.

By ~~again argument~~ Counsel for appellants complain of the judgment as being contrary to the evidence because appellee could have secured another school, but that he made

some which latter is in substance, as follows:

ter written and received after this meeting at the Hotel

date July 17, 1912, and identified by witness Weaver, a fac-

and offered in evidence a letter from Miss Weaver to him of

occurred and identified the evidence of Miss Weaver produced

signal and a tendency to corroborate his statements as to what

Padden denied that he told Mrs. Liddle they had hired a room

room and he said, "Yes, I think we have done well," etc. Mr.

that she heard he had hired Mr. Westcott's room and was

with Henry Padden in which she said that Mrs. Liddle

had testified to a conversation at the home of Mrs. Liddle

...of the ...

212 2590

Have you hired a teacher for the primary level yet?
This winter or is it your intention to have only an assistant?
Please let us know as soon as possible.

75 V 9 3 3

The evidence of this conversation was admitted and the jury was instructed to consider it in connection with the other evidence. The jury returned a verdict of guilty of first degree murder.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

of the judgment as being contrary to the evidence and the

no effort and remained on his farm and attended to his private affairs and for this no deduction was made by the jury.

This suit was brought for a breach of the contract of hiring, and not to recover wages under the contract. Where no services are performed under a contract of hiring, the true rule is that the action must be for a breach of the contract, and the measure of recovery would be the wages to be paid, less any sum actually earned, or which might have been earned by the exercise of reasonable diligence in seeking other similar employment. Prima facie, the measure of recovery where the servant has not been allowed to enter upon the performance of the contract, in a suit for a breach of the contract of hiring, is the wages agreed to be paid by the contract, and the burden, in such cases, of showing what the plaintiff did earn, or could by reasonable diligence have earned in other similar employment, is thrown upon the defendant. The defendant may reduce the recovery made out by the plaintiff's prima facie case by showing what plaintiff did earn, or could have earned by the exercise of reasonable diligence in seeking other similar employment. The question of diligence and ability to secure employment was one of fact. The evidence upon this question was close.

The judgment of the Circuit Court will therefore be reversed and cause remanded.

Reversed and Remanded.

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(Not to be reported in full.)

The judgment of the Circuit Court will therefore be reversed. The evidence upon this question was clear.

tion of diligence and ability to secure employment - a clear difference in seeking other similar employment. The question did arise, or could have arisen by the exercise of reasonable diligence in seeking other similar employment. The plaintiff's prime factor case by seeking what plaintiff defendant. The defendant may reduce the recovery made out by earned in other similar employment, is shown upon the facts.

plaintiff also sought to recover for the loss of wages and benefits. The burden, in such case, of showing that the contract of hiring, is the wages agreed to be paid by the the performance of the contract, in a suit for a breach of recovery where the servant has not been allowed to enter upon other similar employment. Where the servant has been allowed to enter upon the exercise of reasonable diligence in seeking other similar employment, the recovery of wages and benefits is not recoverable. The burden of showing that the contract of hiring, is the wages agreed to be paid by the the performance of the contract, in a suit for a breach of recovery where the servant has not been allowed to enter upon other similar employment, is shown upon the facts.

This suit was brought for a breach of the contract of hiring, and not for recovery of wages and benefits. The no services are performed under a contract of hiring, the true rule is that the recovery must be for a breach of the contract, and the measure of recovery would be the wages to be paid, less any sum actually earned, or which might have been earned by the exercise of reasonable diligence in seeking other similar employment. Where the servant has been allowed to enter upon the exercise of reasonable diligence in seeking other similar employment, the recovery of wages and benefits is not recoverable. The burden of showing that the contract of hiring, is the wages agreed to be paid by the the performance of the contract, in a suit for a breach of recovery where the servant has not been allowed to enter upon other similar employment, is shown upon the facts.

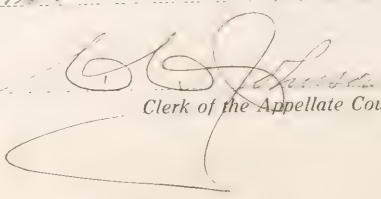
90. Beaver and other animals

Revised and Re-ordered.

(.llut si tette-er-ed ot scñ)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

194 A 66

723

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 66

Brassier

ERROR TO
APPEAL FROM

vs.

No. 12

Circuit COURT

October Term, 1914.

Richland COUNTY

Wilson

TRIAL JUDGE

HON. W. S. H. C.

Term No. 33.

Agenda No. 68.

October Term, A. D. 1914.

Ficklin Brassier,
Appellee,
vs.
Ed S. Wilson,
Appellant.

Appeal from
Circuit Court of
Richland County.

Opinion by Harris, J.

In January, 1913, a suit was brought before a Justice of the peace by appellee against appellant for the value of a heifer said by appellee to have been lost while being pastured by appellant for appellee at the request and instance of appellee and for hire. A judgment was rendered by the Justice of the peace in favor of appellee and against appellant for the sum of \$40.00. An appeal was taken by appellant to the Circuit Court and upon a hearing before jury in the Circuit Court a verdict was rendered in favor of appellee for the sum of \$50.00. Motion for new trial overruled. Judgment on verdict and this appeal.

Appellant urges three errors for a reversal of this judgment.

First: That the verdict is not supported by a preponderance of the evidence.

Second: That the burden is upon appellee to prove authority of agency of Daugherty.

Third: That in order for appellant to be responsible for the loss of the heifer appellee pastured on appellant's land it is necessary for appellee to show that there

October Term, A. D. 1914.

Appeal from
Circuit Court of
Richland County.

vs.
Ed. S. Wilson,
Appellant.

Opinion by Harris, J.

In January, 1913, a suit was brought before a Justice of the Peace by appellee against appellant for the value of a heater sold by appellee to have been lost - while being captured by appellant for appellee at the request and instance of appellee and for hire. A judgment was rendered by the Justice of the Peace in favor of appellee and against appellant for the sum of \$40.00. An appeal was taken by appellant to the Circuit Court and upon a hearing before jury in the Circuit Court a verdict was rendered in favor of appellee for the sum of \$50.00. Motion for new trial overruled. Judgment on verdict and this appeal.

Appellant urges three errors for a reversal of this

judgment. First: That the verdict is not supported by a preponderance of the evidence.

Second: That the burden is upon appellee to prove

authority of agency of Daugherty.

Third: That in order for appellant to be respon-

sible for the loss of the heater appellee captured on appellant's land it is necessary for appellee to show that there

was a contract either express or implied, between appellee and appellant for such pasturage.

It is well established that every legal presumption will be indulged in favor of a judgment and before the same will be reversed or set aside the party complaining must preserve and present in the manner provided by law the errors upon which he relies to ~~xxx~~ over-throw the same. Errors not urged or argued will be considered as waived.

The three questions here presented by appellant deal with the evidence. The preponderance of evidence is not necessarily determined alone by the greater number of witnesses, but where there are the same number of witnesses testifying on each side there may still be a preponderance on one side or the other. The authorities cited by appellant where cases have been reversed holding that the party assuming the burden had failed to prove its case by a preponderance of the evidence are where the issues depended upon one side of the proposition upon an assertion and on the other side by a denial of it by two witnesses of apparent equal credibility. The evidence in this case is given by two witnesses, appellee and appellant, but does not rest alone upon a bare statement of one and a denial by the other. [Appellee testified to what ~~some~~ Daugherty did in relation to appellant's business in 1911, to a conversation in the fall of 1913 with appellant in Daugherty's presence about renting of pasture from Daugherty, amount due, and that appellant said it was all right. The keeping of a book of the pasturing, and appellee's seeing this book with the account against him as to the heifer in question as to when she was taken into the pasture. This conversation is ⁱⁿ not denied by either appellant or Daugherty. Appellant admitted that

and appellant for such testimony.

It is well established that every legal presumption

will be indulged in favor of a judgment and before the same

will be reversed or set aside the party complaining must show

error and present in the record grounds for the error.

Upon which he relies to set aside the same. If none are

shown or alleged, the same will be considered as correct.

The three questions have presented by appellant deal

with the evidence. The preponderance of evidence is not ne-

cessarily indicated by the greater number of witnesses,

but where there are the same number of witnesses testifying

on each side there may still be a preponderance on one side

of the other. The authorities cited by appellant where cases

have been reversed holding that the party assuming the bur-

den had failed to prove its case by a preponderance of the

evidence are where the issues depended upon one side of the

proposition when an assertion and on the other side by a de-

nial of it by two witnesses of opposite equal credibility. The

evidence in this case is given by two witnesses, appellee and

appellant, but does not rest alone upon a mere statement of

one and a denial by the other. Appellee testified to that

Dougherty did in relation to appellant's business in 1912.

a conversation in the fall of 1912 with appellant in Dougher-

ty's presence about renting of pasture from Dougherty, and

that, and that appellant said it was all right. The feeling

of a book of the pasturing, and appellee's seeing this book with

the account against him as to the matter in question as to when

she was taken into the pasture. This conversation is not as-

ried by either appellant or Dougherty. Appellant admitted that

he ^{had} kept such a book of account, but at the time of the trial the book was lost. There are matters that occurred between these parties which must be accepted as true because they are not denied and from which the jury might find from a preponderance of the evidence that there was an implied contract for pasturing entered into through Daugherty as agent and that proof of his authority did not rest alone on his statements to appellee.

The authority of Daugherty to act as agent for Wilson in this behalf and the acceptance by Daugherty for Wilson of this heifer to pasture for hire and it being admitted the heifer was not returned, there was proven an implied contract to pasture for hire and return to owner the property in question or to use the care of an ordinarily prudent person to do so. The law is well settled if the first two propositions have been proven and by reason thereof an implied contract between appellant and appellee then the burden of proof is upon appellant to exonerate himself from liability by proving that the loss occurred without any fault on his part or that the loss occurred through the fault of appellee. (Sheffer vs. Willoughby, 165 Ill., 518).

These were all questions of fact upon which there was evidence to support a verdict and therefore upon that question the verdict of the jury should be final, there being no argument or complaint as to the application of the law, the judgment will be affirmed.

Affirmed.

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(Not to be reported in full.)

be kept such a book of account, but at the time of the trial the book was lost. There are matters that occurred between these parties which must be accepted as true because they are not denied - and from which the jury might find a contract. The evidence of the evidence that there was an implied contract for pastures entered into through the testimony of the parties and that proof of his authority did not rest alone on his statements as appears.

The authority of Daugherty to act as agent for Wilson on this behalf and the acceptance by Daugherty for Wilson of this offer to pasture for him and it being admitted the offer was not returned, there was proven an implied contract to pasture for him and return to owner the property in question or to use the care of an ordinarily prudent person to do so. The law is well settled if the first two propositions have been proven and by reason thereof an implied contract between appellant and appellee that the burden of proof is upon appellant to exonerate himself from liability by proving that the loss occurred without any fault on his part or that the loss occurred through the fault of appellee. (Shaffer vs. ...)

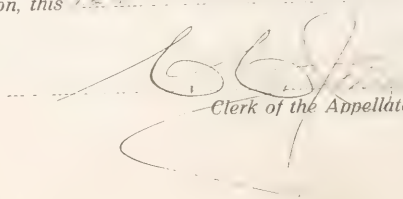
There were all questions of fact upon which there was evidence to support a verdict and therefore upon that question the verdict of the jury should be final, there being no argument or complaint as to the application of the law, the judgment will be affirmed.

Affirmed.

(Not to be reported in full.)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

10 11 12

94 A 68

724

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

✓ Hon. Thomas M. Harris, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 68

ERROR TO
APPEAL FROM

vs.

No. *W W*

October Term, 1914.

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. *W. E. Hadley*

Term No. 33.

Agenda No. 11.

October Term, A.D. 1914.

Granite City Lime and Cement Company,

Appellee,

vs.

Hanover Fire Insurance Company of
New York,

Appellant.

Appeal from
Circuit Court of
Madison County.

Opinion by Harris, J.

This case was tried in the circuit court upon an ~~extended declaration~~ ^{affidavit} declaring upon a fire insurance policy No. 435 issued by appellant on the 20th day of July, 1912, which said policy was set out in said declaration ~~in haec verba~~, insuring appellee for one year against ^{all} direct loss by fire, except as in said policy provided, to an amount not exceeding \$1,500.00 on certain machinery ~~therein described~~ while located and contained in the ~~frame iron clad building~~ situated on Lot 1 in Block 94 Granite City, Illinois, and not elsewhere. Said policy contained other printed permissions and provisions not necessary to be enumerated. The policy was countersigned at Granite City, Illinois, July 20, 1912, by ~~William A. Champion, agent of appellant.~~ ^{Wm. A. Champion, agent of appellant.}

It is further averred that the property described in said policy was on or about the 7th day of ^{February} March, 1912, removed by appellee from the building and location mentioned in the policy to the ^a building of appellee in Block 43 of ~~said~~ ^{Appellee's plant} Granite City; that on or about the date of the removal of ~~the~~ property so insured, and prior to its destruction by fire, ~~appellant~~

*The evidence which was presented was
conceded to be the effect of the
new construction.*

October Term, A.D. 1914.

Appeal from
Circuit Court of
Illinois

Granite City Lime and Cement Company,
Appellee,

Plaintiff,
vs.
Granite City Insurance Company,
New York,
Appellant.

Opinion of the Court.

This case was tried in the circuit court upon an amended declaration in replevin describing upon a fire loss policy No. 450 issued by appellant on the 15th day of July, 1913, which said policy was not in full compliance in fact with the policy as it was written and issued by fire, except as in said policy provided, to wit: not exceeding \$1,500.00 on certain machinery therein described which located and contained in the town of Granite City, Illinois, on lot 1 in Block 24 Granite City, Illinois, and the said policy contained other printed provisions and provisions not necessary to be recited. The policy was issued at Granite City, Illinois, July 15, 1913, by Granite City Insurance Company, of Granite City, Illinois. It is further stated that the policy described in said policy was on or about the 15th day of March, 1913, removed by appellee from the building and location described in the policy to the building of appellee in Block 43 of Granite City, that on or about the date of the removal of said property as insured, and prior to its destruction by fire, the

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~~lee notified and informed appellant through its agent in Granite City, being the same agent who issued said policy, that the said property had been removed and was then located and situated on said Block 43, and was advised by said agent that in consideration of the appellee foregoing its right to cancel said policy and to have the unearned portion of the premium paid on account of said policy returned to appellee, appellant would consent to the removal of said property to a new location, and that said policy would cover said property in said new location the same as in the original location, and that appellant through its agent would endorse such consent, authority and agreement upon said policy. That~~

It further averred that at time of making said agreement as to removal, insurance and endorsement, the said policy of insurance was in the possession of appellant, by its agent at Granite City, and was left with appellant for the purpose of said endorsement, and relied upon appellant to make the endorsement thereon, and said policy has never been returned to appellee; and up to the time of the fire so far as appellee was informed, said endorsement had been made as agreed upon, and ~~said policy yet continued in the possession of appellant.~~

It is further averred that at the time of issuing said policy and from that time hitherto until said property was destroyed, on, to wit: March 23, 1913, appellee had an interest in said property to the amount of the said sum of said appellant's insurance thereon. That from appellee's best knowledge said fire originated by lightning, or some cause unknown to appellee but not from any cause releasing appellant from liability under the terms of said policy. That appellee sustained loss and damage in more than the amount of said policy.

the notified and informed appellant through its agent in the
the said premises had been removed and was then located and
situated on said Block 15, and was advised by said agent that
in consideration of the appellee foregoing its right to own-
ership of said policy and to have the unexpired portion of the premi-
um paid on account of said policy returned to appellant, the
appellant would consent to the removal of said property to said
new location and that said policy would remain in force and
valid until the same was in the original location and
that appellant through its agent would endorse such consent,
whereby the agreement would be binding.

It further stated that at the time of removal, the appellee
was not present, and that the appellant, the said policy,
of insurance was in the possession of appellant by the agent
at the time of removal, and the appellant for the purpose
of said endorsement and relied upon appellant to endorse the
endorsement thereon, and said policy had never been returned to
appellee, and up to the time of the fire so far as the appellee
informed said endorsement had been made as agreed upon, and the
said policy was continued in the possession of appellant.
It is further stated that at the time of the fire
said policy was from that time historic until said policy
was destroyed, on or about March 25, 1915, and that the fire
lost in said property to the extent of the said policy and
appellant insurance thereon. That from appellant's best knowl-
edge said fire originated by lightning, or some cause other
to appellee but not from any cause releasing appellant from
liability under the terms of said policy. That appellee was
not liable for loss and damage to the extent of said policy.

That if forthwith gave notice and did all other acts required of appellee to do according to the terms of the policy. That appellant has not paid appellee the amount of said loss according to the terms of policy but has refused so to do to the damage of appellee in the sum of \$2,000.00.

~~The plea of non-assumpsit was filed to this declaration with notice under plea of general issue that, to-wit, that appellee would deny liability for destruction of property in Block 43.~~
A trial by jury on May 8, 1914, resulted in a verdict for appellee and assessing appellee's damages at \$1,846.33. ^{judgment for}
~~undisputed facts appearing from the evidence are that the policy was issued by appellant through its agents Whitten and Champion, Granite City, Illinois, July 30, 1913, covering the property in controversy, and that at the time said policy was issued said property was in a building in Block 94. That afterwards said property was moved from Block 94 to Block 43 in said city and burned March 23, 1913. That between the 1st and 7th day of February, 1913, appellant's agent was informed that appellee did not have the property covered by policy No. 435 in Block 94. That policy No. 43-5 was not cancelled either by the insured or insurer. That from 1910 to March, 1913, the agents of appellant had done for appellee considerable insurance business and had looked after the renewals from time to time of which policy 435 was one. That the said Whitten had been called upon to furnish appellee with a list of the insurance carried by appellee and from such list offered in evidence there were a number of policies.~~

The disputed facts upon which there is a sharp conflict of evidence are as to when the property in controversy was moved from Block 94 to Block 43, and what was said by appel-

That it is hereby recommended that the sum of \$100,000.00 be appropriated for the purpose of providing for the construction of a new building for the use of the Department of the Interior, and that the same be paid out of the Treasury of the United States.

The State of New York, County of Westchester, ss. I, the undersigned, a Justice of the Peace for said County, do hereby certify that the within and foregoing is a true and correct copy of the original thereof, as the same appears from the records of said County, and that the same are now on file in the office of the County Clerk of said County, at the City of New York.

The attached letter which there is a copy of
List of witnesses as to what the property is now used
as well as Block 40 to Block 43 and what was said by

lee to appellant and whether or not appellant consented to the removal. Appellee seeks to recover upon the policy with the consent of appellant to the removal and the agreement of the agent of appellant to endorse consent to removal on the policy. If there is evidence that either prior to or subsequent to the removal, the agent of appellant agreed with appellee that appellant would consent to the removal and carry the insurance and that he would make the endorsement upon the policy and that he then or afterwards prior to the fire had the policy in his possession, what was done becomes a question of fact and unless the evidence upon these averments of the declaration standing alone would not support a verdict, the verdict must stand.

Appellant contends that the copy of policy No. 435 was improperly admitted in evidence for failure to lay proper foundation. The officers and clerks of appellee were examined with reference to the original policy and their answers for it. The declaration, however, averred that the policy was in the possession of appellant. The evidence shows notice to appellant to produce it and an examination of the agent who issued the policy said he had not the policy and did not know where it was. That he kept a register of policies written by firm and that register contains a copy of the form attached to the policy. The evidence as to a foundation to introduce the copy was sufficient.

It is further contended by appellant that error was committed by permitting appellee to show that the insurance rate was higher in Block 94 than in Block 43. We think the contention of appellant as to the admission of this evidence is correct and the evidence was immaterial. But what harm

did the admission of it do appellant. The rate was higher in the block where they admit the property was covered and if the property had remained in Block 94 appellant would not, according to their contention, be in court. We are unable to agree with appellant that the admission of this evidence did appellant any harm and was not reversible error.

A further contention of appellant is that the evidence of John Ebitson as to the value of the damaged property was improperly admitted. The witness had been with appellee for eleven years, occupying different positions, secretary and treasurer. He testified that he could without memorandum tell what property was destroyed and the fair cash market value of it. It has been held that the same foundation is not required where it is the owner giving the evidence as to value. The owner is presumed to have the technical knowledge as to value that would permit him to testify, and we think this should apply to this witness. He testified as to its value in giving a total amount. He was afterwards interrogated as to how he arrived at the amount and then items, both on direct and cross examination, his knowledge or lack of knowledge as shown by this examination went to his credibility as a witness and not to his competency as a witness upon this subject or the foundation to be laid to testify. The court did not commit error in permitting witness to testify or in refusing to strike his evidence.

Appellant objects to the proof of damages on the further ground that the evidence shows the property was not entirely destroyed and the value of the salvage was not taken into account by the witnesses in fixing damages. Witness Hendricks testified that the property for use was destroyed and

did the admission of it as a fact. The fact was that the
the place where they were the property was destroyed and it was
property had remained in place by accident and it was
ing to their condition, but in fact, it was not the same
with appellant that the admission of this evidence is not
and any other and not a reasonable one.

A further contention of appellant is that the evi-
dence of John Ellison as to the value of the property was
was improperly admitted. The witness had been a witness
for eleven years, allegedly without prejudice, and he
testified that he would not have known anything about
that property was destroyed and the fact that the value of
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where it is the same thing the evidence is in fact.

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that would permit him to testify, and he has been permitted
to do this witness. He testified as to the value of the
a total amount. He was afterwards interviewed as to the
arrived at the amount and then again, both on direct and cross
examination, his knowledge or lack of knowledge as to the
this examination went to his credibility as a witness and not
to his competency as a witness upon this subject or the founda-
tion to be laid to testify. The court did not hold that
in permitting witness to testify or in relating to the
evidence.

Appellant objects to the proof of damage on the
further ground that the evidence shows the property was not
entirely destroyed and the value of the savings was not fully
information by the witnesses in their depositions. Witness
wrote testified that the property for use was destroyed and

that it was worthless. This would seem, unless further evidence was offered, to be sufficient to justify the conclusion that the salvage had no value. Witness Eisenmeyer, Jr., says that the property was rendered useless by the fire. That the evidence of this witness and Hendricks that the salvage was worthless stands uncontradicted. The cases cited by appellant, as to proof of measure of damages have no application to the facts in the case at bar.

"Appellant's errors one and two that the peremptory instruction should have been given and that the verdict is not supported by the weight or preponderance of the evidence," The Court properly refused the peremptory instruction because there was evidence, more than a scintilla, tending to prove the consent of appellant to the removal of the property and the ^{reem} agent of appellant to endorse that consent on the original policy and that the original policy was in the possession of appellant and proof of the amount of the damages. This evidence except as to the consent to removal and agreement to endorse *and* the possession of the policy, were not controverted. The peremptory instruction was properly refused.

It is not necessary under the authorities to prolong this opinion by citing authorities as to when a court of appeal may reverse a case as being against the weight or preponderance of evidence. We regard it sufficient to say, from an investigation of this record, that the verdict is in harmony with numerous authorities which hold that where there is a conflict of evidence and the jury gave credit to the testimony of one party's witnesses over the other and the court in overruling the motion for new trial gave credit accordingly, we

that it was voluntary. This would mean, unless otherwise
shown and stated, as the defendant is bound to show
that the property was not taken from him. The
evidence of this witness and Hendricks that the witness
was not the defendant. The case cited by the
as to proof of intent of defendant have no application to the
facts in the case at bar.

"Appellant's errors one and two that the defendant
instruction should have been given and that the verdict is
not supported by the weight or preponderance of the evidence."
The Court properly refused the defendant's proposed instruction
there is evidence, more than a scintilla, tending to show
the defendant of intention to take the property of the victim
the intent of defendant to take the property of the victim
voluntarily and that the defendant's policy is in the possession
of the property and took it from the victim. This evidence
except as to the consent to removal and agreement to return the
the possession of the property, was not sufficient to
satisfy instruction and properly refused.

It is not necessary under the instructions to
follow this opinion by citing authorities as to when a
appeal may reverse a case as being against the weight or
preponderance of evidence. As regard its sufficiency to
an investigation of this record, that the defendant is
many with numerous witnesses who have testified to the
a conflict of evidence and the jury have reached the
many of one party's witnesses over the other and the
overturning the motion for new trial have been

can see no good reason for disturbing the verdict. (Pabst Brewing Co. vs. La Page et al., 136 Ill. App. 468.)

The contention of appellant as to the improper remarks of counsel in the argument, it is beyond dispute that counsel may in their zeal to succeed for their client encroach upon the ethics of the profession and the rights of litigants, so as to jeopardize their verdict and for such conduct cases have been reversed. However, it is where the court is not satisfied it did not result in injury to appellant. (Tahsah Railroad Co. vs. Billings, 212 Ill., 37.)

In this argument statements of fact were made that were not in dispute such as the denial of the issue and possession of policy and an attempt to refer to the company's attorney in a slighting manner objected to and sustained. The remarks were improper and if upon the issue of damages there was a conflict of evidence, it might cause a reversal of the case. It is evident that the remarks did not cause the jury to render a verdict for more damages, and if not it did not cause the jury to find for appellee when, if they had not been made, they would have found for appellant. The Court performed its duty in so far as it was called upon to act and we do not think, while the remarks were improper, they were reversible error.

Appellant contends that the court's refusal to give appellant's refused instructions number 1, 2 and 3 is reversible error on the ground that the issues should have been defined to the jury.

The court gave for appellee one instruction and nine for appellant, which, when read and considered as a series,

one set of facts which the defendant has presented.

It is the duty of the jury to weigh the evidence.

The defendant is entitled to a fair trial.

It is the duty of the jury to weigh the evidence.

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correctly define the issues in this case. Appellant's fifth, sixth and seventh instructions, in substance, give the issues under the declaration and plea.

It is true that the instructions refused presented one or more of these issues in different language. However, counsel cannot complain when he has covered the same subject matter in several instructions submitted to the court, because the court gave the instruction counsel regard the least favorable. We find no reversible error in the refusal of instructions.

Counsel for appellant contend that the giving of appellee's instruction allowing interest is error. The policy introduced in evidence provides that the amount due shall be paid within sixty days from the receipt of proof of loss. The evidence was that proofs of loss had been received by the company. Under this state of evidence it was incumbent upon appellant, if liable, to ascertain for what amount and pay or tender the amount it found due. If the company failed in this and was afterwards found liable it is also liable for interest for a detention of the amount due. This is true whether a policy be for life insurance or loss by fire. (Firemans Ins. Co. vs. Western Refrigerating Co., 182 Ill., 388. McNellis vs. Aetna Ins. Co., 176 Ill. App., 575.)

The appellant, if liable, was liable for interest and the giving of the instruction was not error.

We find that the verdict is supported by the evidence and there is no reversible error. The judgment will therefore be affirmed.

Affirmed.

(Not to be reported in full.)

not only define the issues in this case, but also
 state and answer questions, in substance, give the issues
 under the instruction and give the answers.
 It is true that the instructions refused to
 one or more of these issues in different language. However,
 counsel cannot complain when he has covered the same matter
 after in several instructions submitted to the court, because
 the court gave the instructions counsel argued the issue for
 example. We find no reversible error in the refusal of instruc-
 tions.

Counsel for appellant contends that the giving of
 appellee's instruction allowing interest is error. The poi-
 nt introduced in evidence provides that the amount due shall
 be paid within sixty days from the receipt of proof of loss.
 The evidence was that proof of loss had been received by the
 company. Under this state of evidence it was incumbent upon
 appellee, if liable, to ascertain the exact amount due and
 tender the amount it found due. If the company failed to do
 so and afterwards found liable it is also liable for interest
 for a detention of the amount due. This is true whether a
 pay be for life insurance or loss by fire. (Riverside Ins. Co.
 vs. Western Refrigerating Co., 102 Ill. 322. McKelvie vs. Western
 Ins. Co., 170 Ill. App. 275.)

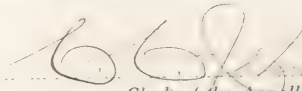
The appellant, if liable, was liable for interest
 and the giving of the instruction was not error.
 We find that the verdict is supported by the evidence
 and there is no reversible error. The judgment will
 be affirmed.

Affirmed.

(Not to be reported in full.)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this day of May, A. D. 1915.


.....
Clerk of the Appellate Court.

94 A 71

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 71

Botton

ERROR TO
APPEAL FROM

vs.

No.

35

October Term, 1914.

Civil

COURT

Williamson

COUNTY

Lewis

TRIAL JUDGE

HON.

M. W. Glens

October Term, A. D. 1914.

The Village of Bolton,

Appellant,

vs.

Oliver Lewis,

Appellee.

Appeal from the
Circuit Court of
Williamson County.

Opinion by Harris, J.

Suit ~~was brought before a justice of the peace upon~~
~~complaint by appellant against appellee charging appellee with~~
~~violating section one of ordinance fourteen of the ordinances~~
~~of the Village of Bolton by reason of having sold intoxicat-~~
~~ing liquors within the corporate limits of said Village, with-~~
~~in 18 months prior to the 25th day of August, 1913. A judg-~~
~~ment was rendered by the justice of the peace from which an~~
~~appeal was prosecuted to the circuit court, a trial resulting~~
~~in a verdict finding appellee not guilty and this appeal.~~
 Appellee had been engaged in the drug business in
 the Village of Bolton, commonly called Stonefort, for about
 15 years. All of the time except the last three years he had
 been interested as a partner, and the last three years he had
 been individual owner of the drug store. That said Village
 had a population of about five hundred people. That appellee
 had within eighteen months prior to the filing of the complaint
 sold ~~several~~ ^{one and three ounce bottles} persons tincture of ginger; that tincture of ging-
 er is composed of from 90 to 95 per cent alcohol and the bal-
 ance ginger, ^{which} and in its pure state is intoxicating, and when
 for use it is diluted in water if taken in sufficient quanti-

ORDER OF THE COURT

Appeal from the
Circuit Court of
the County of

The Village of Bolton
County of Bolton
State of New York
In the Matter of

complaint of ~~the Village of Bolton~~ against ~~the Village of Bolton~~ for
violating ~~the Village of Bolton~~ ~~the Village of Bolton~~ ~~the Village of Bolton~~
of the Village of Bolton by reason of having sold intoxicating
liquors ~~the Village of Bolton~~ ~~the Village of Bolton~~ ~~the Village of Bolton~~
it is hereby ordered that the justice of the peace for the
county be proceeded to the circuit court, a trial resulting
in a verdict finding ~~the Village of Bolton~~ not guilty and ~~the Village of Bolton~~
Appellee had been engaged in the drug business in
the Village of Bolton, commonly called ~~the Village of Bolton~~ for about
15 years. At ~~the Village of Bolton~~ ~~the Village of Bolton~~ ~~the Village of Bolton~~
been interested as a partner, and the last three years he has
been individual owner of the drug store. That ~~the Village of Bolton~~
has a population of about five hundred people. That ~~the Village of Bolton~~
had within eighteen months prior to the filing of the complaint
sold ~~the Village of Bolton~~ persons ~~the Village of Bolton~~ of ~~the Village of Bolton~~
it is composed of from 50 to 60 per cent alcohol and the bal-
ance ginger and in its pure state is intoxicating, and has
for use it is diluted in water in sufficient quanti-

ties it is intoxicating. That appellee sold tincture of ginger in one ounce and three ounce bottles to the public generally with and without prescriptions; that it is a medicine and so recognized in United States Dispensatory and a formula is given for its preparation therein; that some persons who purchased it medicinally and others as a beverage. That appellee had limited the sale of it to certain persons to a three ounce bottle per day. That appellee had heard it rumored that certain persons were using it to excess as a beverage.

Appellant first insists under its assignment of error that the verdict is manifestly against the weight of the evidence. We regard this as the controlling question to be decided on this appeal. That appellee sold tincture of ginger; that tincture of ginger taken in sufficient quantities is intoxicating is not in dispute. It is further admitted that tincture of ginger is recognized as a medicine and may be sold as such. It was therefore incumbent upon appellant to prove by the clear weight of the evidence that sales were made by appellee or his agents under such circumstances that appellee was bound to know, acting in good faith, that the purchasers intended to use and had been using the tincture of ginger, not as a medicine, but as a beverage. This was the question of fact upon which there was a contest and upon which there was a conflict of evidence.

It is argued that from the admissions of appellee and his fixed rule as to the sale of not more than a three ounce bottle per day, guilty knowledge is established and that when so established the evidence as to the manner in which it was sold becomes a mere shift or device to evade the law.

It is argued that from the admissions of appellants and the fixed rules of law it not more than three ounces bottle per day, guilty knowledge is established and that when so established the evidence as to the manner in which it was sold becomes a mere shift or device to evade the law.

~~Appellee does not say~~ that five or six years ago ^{while he was} he was told that Simon and Ed Hancock and Tom Pea were not allowed tincture of ginger because they were drinking too ^{to excess,} much of it and on that account ^{therefore} appellee had refused since to sell it to them. That he had been told that Cortez Osborne was using it to excess, by the father and he stopped selling to him, except in one instance afterwards when the father of Cortez gave his son a prescription for it. That prior to the filing of the complaint appellee heard rumors that certain persons were using tincture of ginger as a beverage. This appears as the strongest evidence of knowledge upon the part of appellee that tincture of ginger sold by him ~~is~~ being used as a beverage. The reasons he gave for not selling to the Hancocks and Pea should not within itself be taken as proving that he knew that all other purchasers bought it for the same purpose. The same is true as to sales to Cortez Osborne and of the rumor. It was, however, evidence to be considered by the jury with all the other evidence as to whether appellee was selling in good faith for medicinal purposes. There is evidence tending to show frequent sales to certain individuals but no evidence of drunkenness.

Then all is said with reference to this evidence we are back to the proposition so often defined by courts of review. That the Judge and Jury who try the case in the court below have vastly superior advantages for the ascertainment of the truth and detection of falsehood. That whenever there is a contrariety of evidence and the facts and circumstances by reasonable intendment, will authorize the verdict, notwithstanding it may appear to be against the strength and weight of the testimony, the verdict will not be set aside. (I.C.R.R.

of the testimony, the verdict will not be set aside. (I.C.R. 11)
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 Collier gave his son a prescription for it. That prior to the
 to him, except in one instance afterwards when the father of
 was using it to excess, by the father and he stopped selling
 sell it to them. That he had been told that Dr. Collier Collier
 used it and he had never sold it and he had never sold it
 tincture of ginger because they were drinking too
 he was told that tincture of ginger was not for sale

Co. vs. Gillis, 68 Ill., 317; Culvert vs. Carpenter 96 Ill., 63.)

We think there is evidence to support this verdict and when the jury who alone are in a position to test the credibility of witnesses, is considered we cannot say it is manifestly against the weight of the evidence.

Appellant complains of the ruling of the trial court in refusing to permit appellant to prove by witness George W. St. John that Mark Cross, one of the persons for whom tincture of ginger was purchased by St. John, was a habitual drunkard. There was no evidence that Cross had ever purchased of appellee or his clerk within the eighteen months any tincture of ginger or that he had ever been found intoxicated upon tincture of ginger. There was evidence that St. John at the request of Cross had purchased of appellee tincture of ginger for him and that appellee informed St. John Cross could not purchase tincture of ginger from him. That St. John did not inform appellee for whom he was making the purchase. This evidence was not under this state of the record competent.

Appellant insists that the court admitted improper evidence for appellee. We have examined the record and find that the error in the admission of evidence, if any, was harmless error. The same may be said as to the error assigned and argued with reference to improper questions to which objections had been sustained. This is not the character of questioning referred to in case of Chicago & State Line Railroad Co. vs. Mary Kline, 220 Ill., 334. The jury could not have formed an opinion as to guilt or innocence of appellee

10. The Court, in its opinion, is of the opinion that the evidence is not sufficient to support the verdict.

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upon the questions: "Which do you think was the most palatable drink cologne or ginger? The practice of following a line of examination to which the Court has sustained objections is not to be commended but to cause a reversal upon that ground alone, the court of review must be of the opinion that the error had something to do with a verdict that could have been different if the error complained of had not been in the case.

Finally appellant insists that the giving of appellee's fifth instruction was error. The case was tried and the jury were instructed upon the question of whether or not appellee did know or in the exercise of reasonable diligence could have known that tincture of ginger sold by appellee was used as a beverage.

Appellee's sixth instruction stated the law as applied to the facts in this case correctly. The fifth was not in conflict therewith but held the appellant by a close interpretation to a higher degree of proof. The instruction was not in proper form, but when considered with all the instructions as a series we are of opinion that the error was harmless.

We find no errors which we think affected the verdict in this case and the judgment will therefore be affirmed.

Affirmed.

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(Not to be reported in full.)

upon the question: "How do you think the two witnesses which follow are correct? The practice of following a line of examination to which the Court has sustained objections is not to be continued but to cause a reversal upon that ground alone, the Court of review must be of the opinion that the error was something to do with a verdict that would have been different if the error consisted of not having done so."

Finally appellant insists that the giving of appellee's fifth instruction was error. The case was tried and the jury were instructed upon the question of whether or not appellee did know or in the exercise of reasonable diligence would have known that the signature of Singer was by appellee and used as a forgery.

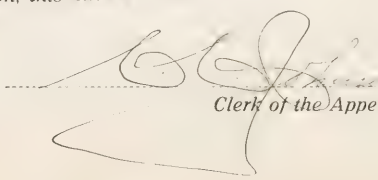
Appellee's sixth instruction stated the law as applied to the facts in this case correctly. The fifth was not in conflict therewith but held the appellant by a loose interpretation to a higher degree of proof. The instruction was not in proper form, but when considered with all the instructions as a series we are of opinion that the error was harmless.

"We find no errors which we think affected the verdict in this case and the judgment will therefore be affirmed."

(Not to be reported in full.)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

94 A 46

728

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 85

ERROR TO
APPEAL FROM

vs.

No. 46

October Term, 1914.

Biscuit COURT

Saline COUNTY

TRIAL JUDGE

HON. Chas. A. Butler

Term No. 46.

Agenda No. 35.

October Term, A. D. 1914.

H. C. M u r r a h,

Appellant,

vs.

A.L.Russell and R.E.Holmes
as Executors of the Last
will and testament of W.S.
Blackman, deceased,

Appellees.

Appeal from the
Circuit Court of
Saline County.

Opinion by Harris, J.

Appellant filed in the County Court of Saline County to the November Term, 1913, thereof, his claim for \$785.19 against the estate represented by appellees. Objections were filed by appellees as executors. The claim was disallowed and an appeal taken by appellant to the Circuit Court of said County where at the April Term, 1914, a jury was waived and a trial before the court resulted in the disallowance of the claim; a judgment in favor of appellees and against appellant for costs.

~~The facts which enter into this controversy date~~
~~back to June 9, 1899, at which time~~ ^{on June 9, 1899} ~~Appellant~~ then
and had been conducting a school, known as Creel Springs College and Conservatory of Music, which was a Baptist organization, supported in part by donations. That ~~on the day last~~
~~mentioned this college by its so called president and secretary,~~
executed a note for \$1,256.20 with 7% interest from
date, payable on the 20th day of July, 1899, to H.C. Murrah.
Said note was secured by chattel mortgage on personal property
belonging to the institution. July 25, 1899, five days after

October Term, A. D. 1916.

H. C. Russell and R. E. Holmes

Appellants,

vs.

A. I. Russell and R. E. Holmes
as Executors of the Last
will and testament of "R. E.
Hickman, deceased,"
Appellees.

Appeal from the
Circuit Court of
the County of Saline

Opinion by Harris, J.

Appellant filed in the County Court of Saline County to the November Term, 1915, thereof, his claim for \$385.18 against the estate represented by appellees. Objections were filed by appellees as executors. The claim was also allowed and an appeal taken by appellant to the Circuit Court of said County where at the April Term, 1916, a jury was waived and a trial before the court resulted in the disallowance of the claim; a judgment in favor of appellees and against appellant for costs.

The facts which enter into this controversy date

back to June 2, 1899, at which time appellant was then

and had been conducting a school, known as Great Springs College and Conservatory of Music, which was a Baptist organization, supported in part by donations. That on the day just mentioned this college by its so called president and secretary, executed a note for \$1,250.00 with 7% interest from date, payable on the 30th day of July, 1899, to H. C. Russell. Said note was secured by chattel mortgage on personal property belonging to the institution. July 25, 1899, five days after

the maturity of the note, this note and mortgage was placed in the hands of the attorney for mortgages, who took possession of the property and began a foreclosure. At that time the deceased W. S. Blackman and J. S. Heaton executed a note for the sum of \$400.00 which said note was applied on the satisfaction of the original note and mortgage. This last mentioned note of \$400.00 dated July 25, 1909, to H.C. Murrah is the basis of this controversy. Nothing was paid on this note by either Blackman or Heaton, but on the 15th day of July, 1909, there was a credit endorsed on the back of this note of the sum of \$5.00. The circumstances surrounding this endorsement and the competency of the evidence of the making of the endorsement is the important question in this case.

Mrs. Gertrude B. Murrah, wife of claimant, is the only witness to this transaction. She says, that between Blackman and herself there was a business transaction in and by which as surety she had paid for Blackman \$30.00 interest and had received from Blackman and given him credit for amount so paid prior to her visit to him at Carrier Mills July 15, 1909, with the note in question for the purpose of collecting or renewing the same. While she was in Carrier Mills she wanted a new note from Blackman and he suggested that he would endorse a \$5.00 credit on the note and make it better than a new note. ^{He stated} That he was in such a feeble condition he could not make the endorsement and authorized her to do so which she did. The deceased never paid any money in pursuance of this endorsement. The witness suggested to deceased that she would take \$5.00 from what deceased had sent her in satisfaction of what was due her and pay it to her husband, which she says she did, but ^{did} does not fix any time when she paid him.

the maturity of the note, this note and mortgage was placed in the hands of the attorney for mortgagee, who took possession of the property and began a foreclosure. At that time the deceased W. S. Blackman and J. S. Horton executed a note for the sum of \$400.00 which said note was applied on the satisfaction of the original note and mortgage. This last mentioned note of \$400.00 dated July 25, 1899, to H.C. Horton is the basis of this controversy. Nothing was paid on this note by either Blackman or Horton, but on the 15th day of July, 1909, there was a credit endorsed on the back of this note of the sum of \$5.00. The circumstances surrounding this endorsement and the competency of the evidence of the making of the endorsement is the important question in this case. Mrs. Gertrude B. Munnich, wife of defendant, was the only witness to this transaction. She says that before the endorsement and herself there was a business transaction in and by which as surety she had paid for Blackman \$75.00 interest and had received from Blackman and given him credit for amount so paid prior to her yield to the defendant wife July 15, 1909, with the note in question for the purpose of collecting or renewing the same. While she was in Gertrude Munnich and undered a new note from Blackman and he suggested that he would endorse a \$5.00 credit on the note and make it either a new note. That he was in such a feasible condition he could not make the endorsement and authorized her to do so which she did. The deceased never paid any money in payment of this endorsement. The witness suggested to defendant that she would take \$5.00 from what deceased had sent her in satisfaction of what was due her and pay it to her husband, which she says she did but does not fix any time when she paid him.

Appellant testified in the County Court that this note was a gift by deceased and Henton. He was not present and did not testify in the Circuit Court. One of the contentions insisted upon by appellee is that this note was in the nature of a gift or a promise to give. Admitting the law as cited by appellees the facts do not make that contention good. At the time this note was executed appellant held what was recognized as a binding obligation of this institution. This note was not made to the college but direct to the creditor of the college and when accepted by him in satisfaction of that much of the college debt it became between appellant and the college the same as so much cash. So as between appellant and appellees' deceased it was no longer a promise to give but a gift in the hands of a legal holder for value.

The appellant however insists that if there was a sufficient consideration to support this note the Court committed error in entering judgment against him. The same presumptions follow the finding of the court as follow the verdict of a jury as to questions of fact. And it may be further presumed that the Court considered only competent testimony, and under the rule the judgment is to be upheld if sustained by competent proof.

The note in this case was offered and admitted in evidence. The endorsement was offered but not admitted in evidence. Where the statute of limitations is plead as a defense as in this case it is an affirmative defense but from the note admitted and considered in evidence it affirmatively appears that it was not a promise made within the statute of limitations. This statute of limitation had run on this note unless the endorsement was proven by competent evidence and

showing such a promise as the law requires to take it out from under the statute. That brings us to the question of the competency of Mrs. Gertrude Murrah, wife of claimant, under the objection that as the wife of appellant she was incompetent. Under our statute it is admitted the claimant was incompetent. It is also admitted that as the wife of claimant she would be incompetent. But it is insisted by appellant because she was not only the wife but acting at this particular time also as the agent of her husband in obtaining a renewal of this note, and as such agent she is a competent witness regardless of the fact that she is and was the wife of appellant.

The statute makes appellant incompetent and also says that the wife may testify for the husband as his agent in the same manner as other parties may under the provisions of said act. The word "party" in the other provisions of the act is clearly distinguished from the word person and always means party to a suit or party in interest in the suit. (Treleaven vs. Dixon, 119 Ill., 553). It must have been intended that it have the same meaning in this section. As a party in interest appellant is not only incompetent but his wife is incompetent. (Heintz vs. Dennis, 216 Ill., 486. Schneider vs. Sulzer, 212 Ill., 87).

The statute therefore only made the wife an agent competent witness in cases where the husband would be competent as the party to the suit. If it were otherwise we would be met with the situation in this class of cases in having

both husband and wife incompetent except where the wife was the agent of the husband, then notwithstanding her interest as the wife and her incompetency, she would be permitted to testify. We think the plain meaning of the statute to be the contrary and the note and its endorsement under the law was not properly proven and was not to be considered as competent evidence.

This disposes of the right of appellant to a recovery and the judgment will therefore be affirmed. AFFIRMED.
(Not to be reported in full.) (4)

showing such a finding as to the competency of the witness under the statute. That brings us to the question of the competency of the witness. It is not necessary to say under the objection that as the wife of appellant she was incompetent. Under our statute it is admitted the witness was incompetent. It is also admitted that as the wife of appellant she was not only not acting as this particular time also as the agent of her husband in obtaining a renewal of this note, and as such agent she is a competent witness regardless of the fact that she is and was the wife of appellant.

The statute makes appellant incompetent and also says that the wife may testify for the husband as his agent in the same manner as other parties may under the provisions of said act. The word "party" in the other provisions of the act is clearly distinguished from the word person and always means party to a suit or party in interest in the suit. (Trelawney vs. Dixon, 111 Ill. 553). It must have been intended that it have the same meaning in this section. As a party in interest appellant is not only incompetent but his wife is incompetent. (Harris vs. Dennis, 216 Ill. 430. See also Sulzer, 216 Ill. 87).

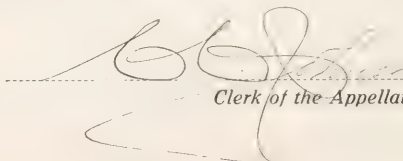
The statute therefore only says the wife of appellant is incompetent in cases where the husband would be competent as the party to the suit. If it was otherwise it would be met with the situation in this class of cases in having both husband and wife incompetent except where the wife is the agent of the husband, then notwithstanding her incompetency as the wife and her incompetency, she would be permitted to testify. We think the plain meaning of the statute is to be the contrary and the note and its endorsement under the law not properly proven and not to be considered as competent evidence.

This disposes of the right of appellant to a recovery and the judgment will therefore be affirmed. (Not to be reported in full.) (4)

ATTORNEYS.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

NOIN

1914 A 47

729

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

✓ Hon. Thomas M. Harris, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 87

Reynolds

ERROR TO
APPEAL FROM

vs.

No.

48

Circuit

COURT

October Term, 1914.

Madison

COUNTY

A. G. & L. Trac. Co.

TRIAL JUDGE

HON.

Geo. A. Brown

October Term, A. D. 1914.

Joseph C. Reynolds,	}	Appeal from Circuit Court of Madison County.
Appellee,		
vs.		
Alton, Granite & St. Louis Traction Company,		
Appellant.	}	

Opinion by Harris, J.

This is an action in case brought in the circuit court by appellee against appellant for damages occasioned by personal injury, claimed to have been received by appellee April 3, 1912, while boarding a car operated by appellant, upon Second Street and Madison Avenue in the Village of Madison. Subsequent to the bringing of the suit the East St. Louis & Suburban Railway Company was joined as a party defendant and an amended declaration consisting of two counts filed against the two defendants. At the close of appellee's evidence the defendant East St. Louis and Suburban Railway Company was dismissed out of the case and the trial proceeded against appellant.

The amended declaration in the first count alleged that on the 3d day of April, 1912, the defendants were operating an electric railroad in the Village of Madison with a car running thereon, for the conveyance of passengers for reward; that appellee, at Second and Madison streets, became a passenger on a certain car of the defendants' railroad, to be carried for reward; that it became the duty of appellant to stop its car upon arrival at Second and Madison streets to give

Subscribed by J. C. Smith.

Attest:
Clerk of Court

Joseph C. Smith,
Appellee,
vs.
Alton, Granite & St. Louis
Traction Company,
Appellant.

Opinion by Justice, J.

This is an action in debt brought by the plaintiff

against the defendant for damages sustained by

personal injury, claimed to have been received by appellee

April 5, 1912, while boarding a car operated by appellant, near

Second Street and Madison Avenue in the Village of Manhattan.

Subsequent to the bringing of the suit the St. Louis &

Suburban Railway Company was joined as a party defendant and

an amended declaration consisting of two counts filed in this

case. At the close of appellee's evidence the

defendant East St. Louis and Suburban Railway Company moved to

dismiss out of the case and the trial proceeded against appellee

alone.

The amended declaration in the first count alleged

that on the 24 day of April, 1912, the defendant was

riding on electric railroad in the Village of Manhattan.

For the conveyance of passengers the

defendant had running thereon, for the conveyance of passengers

cars, that appellee, at Second and Madison streets, boarded

a passenger car on a certain one of the defendant's electric

cars for transit.

That it became the duty of appellee to

step the car upon arrival at Second and Madison streets to give

appellee an opportunity to safely get on board of said car;
that the defendants did not regard their duty or use due care
in that behalf, but on the contrary, upon the arrival of the
car at Second and Madison streets, and while appellee with due
care and diligence, was then and there about to get on said
car, that the defendants carelessly and negligently caused
said car to be suddenly and violently started and moved and
then and there appellee was thrown with great force and vio-
lence under the car, by means whereof the right foot of appel-
lee was thereby crushed by one of the wheels of said car, and
he was otherwise greatly bruised and hurt. Allegations for
expenditures on account of injury, medical services, etc., dam-
ages \$15,000.00.

The second count includes the formal averments of
first count and alleged that appellee was desirous of becom-
ing a passenger to Granite City; that the car stopped at Sec-
ond and Madison Streets for purpose of taking on passengers;
that other passengers were then and there taken on the car
and that appellee was using due diligence to get aboard but
before he could do so defendants, not regarding their duty to
stop said car a reasonable time to permit passengers there to
safely get aboard, said car was carelessly, negligently and
violently started while appellee with due care was attempt-
ing to get on same; and thereby he was with great force and
violence thrown under the car and injured as alleged in first
count.

Separate pleas were filed by the defendants, ~~The~~
pleas of appellant being the general issue and a special plea
setting up that appellant was not using or operating the road

appellants in an attempt to establish that the defendants did not exercise their duty of care for the passengers in that behalf, but on the contrary, upon the arrival of the car at Second and Madison streets, and while the car was there, and during the time that the defendants carelessly and negligently caused the car to be suddenly and violently started and moved forward and thereupon the appellants were thrown from the car and injured under the car, by some person the right of whom was thereby crushed by one of the wheels of said car, and he was otherwise greatly injured and hurt. Allowing for expenditures on account of injury, actual services, etc., the sum of \$15,000.00.

The second count includes the first count and the first count and alleges that appellants were passengers on a car for the purpose of taking a ride on Second and Madison streets for the purpose of taking a ride on Second and Madison streets, and that the car was started and moved forward and the appellants were thrown from the car and injured under the car, by some person the right of whom was thereby crushed by one of the wheels of said car, and he was otherwise greatly injured and hurt. Allowing for expenditures on account of injury, actual services, etc., the sum of \$15,000.00.

Separate pleas are filed in the case of each of the counts of appellant being the general issue and a plea of not guilty to each count and setting up that appellant was not negligent or careless in the

on which appellee was injured. A trial was had, the jury finding for appellee, and assessing damages at \$8,000.00.

This is the second jury to find for appellee and allow him damages. The second appeal to this court, the evidence upon the former hearing being ^{practically the same} ~~practically the same~~. The case was reversed for error in giving instructions. The evidence of appellee ^{was} ~~is~~ the only direct evidence of the time, the place and how the injury occurred.

Appellee ~~says he~~ ^{and} was 33 years of age; had been a locomotive engineer for about ^{W.} ~~twelve~~ years, and ~~was earning~~ at time of accident forty-five cents per hour and working twelve hours per day, or about \$180.00 per month, and was at the time in excellent health. ~~That~~ ^{He} lived on Fourth Street and Madison Avenue in the Village of Madison. April 3, 1912, he had been driving in afternoon with his family, and after supper he started to Granite City. He walked three blocks on to Madison Avenue where the cars were running at something like every thirty minutes. There was no car in sight and he walked down to Second Street and Madison Avenue, and when he came to Second and Madison Streets the car came from the south and east, going north on Madison Avenue to Granite City. Then the car came around on the straight track two ladies were waiting, the car stopped and picked them up, and when they got on he took hold of the hand-hold and stepped on the step and as he did so, the car started suddenly and he was thrown, in some manner lost his balance and fell, and as he fell he felt a numbing sensation in his right foot. He was taken from the office of Dr. Hamm that night to the hospital where an operation was performed. He remained in the hospital at

of which... A trial was had, and the jury...
 finding for appellee, and assessing damages at \$2,000.00.
 This is the second jury to find for appellee...
 allow him damages. The second appeal to this court...
 license upon the license bearing being previously...
 case was reversed for error in giving instructions. The...
 license of appellee is the only license...
 the place and has the right...
 Appellee says he was 33 years of age, had been...
 locomotive engineer for about twelve years, and was a...
 at time of accident forty-five cents per hour and...
 twelve hours per day, or about \$10.00 per month, and was...
 the place in...
 and Madison Avenue is the...
 he had been driving in afternoon with his family, and after...
 supper he started to...
 on to Madison Avenue where the cars were running...
 like every thirty minutes. There was no car in sight and he...
 walked down to Second Street and Madison Avenue, and when he...
 came to Second and Madison Streets the car came from the...
 and east, going north on Madison Avenue to Grand...
 the car came around on the straight track two inches...
 waiting, the car stopped and...
 got on he took hold of the hand-hold and stepped on the...
 and as he did so, the car started...
 in some manner lost his balance and fell, and as he fell...
 left a mangled sensation in his right foot. He was taken...
 from the office of Dr. H... that night to the hospital...
 an operation was performed. He remained in the hospital...

Granite City at this time fourteen days, after which he returned to his home and remained until June 3, 1933, from there he went to a specialist in St. Louis where he remained five or six weeks and submitted to a second operation. He was out of employment about nine months. The last amputation being between the ankle and knee joints.

The appellant urges as grounds for reversal of this judgment:

First: That verdict is against the manifest weight of the evidence.

Second: Error in the exclusion of evidence.

Third: Errors in giving and refusing instruction.

The first error argued: The Court's refusal to give appellant a new trial because the verdict was against the manifest weight of the evidence is the one that appears to give the most serious trouble. That appellee met with an injury to his foot which after two amputations left him with one leg is as far as court or jury can get in this case, without entering upon, from either side, a consideration of the most unnatural and unreasonable state of facts and contrivances.

The appellee was either hurt at Second and Madison Streets, while trying to board this car as a passenger, as he says, or he was injured at that place while trying to board the car while in motion, or he was injured by a car on the McKinley line on what is called G Street by throwing himself under the car as urged by appellant. That some of the statements would indicate from the first that he wanted amputation and a second amputation. On the other hand physicians have testified both amputations were necessary. In other words the appellee was injured as he says or he was injured by his own

...of the evidence. ... Second: Error in the exclusion of evidence. ... Third: Error in stating and instructing the jury. ... The first error consists in the court's refusal to give appellant's own oral testimony and exclude the evidence of the weight of the evidence is the one that would give the most serious trouble. That appellee was injured to his foot which after two operations left him with one leg is as far as court or jury can get in this case, either entering upon, from either side, a consideration of the natural and unreasonable state of facts and contradictions. The appellee was either hurt at Second or Third Street, while trying to board this car as a passenger, or he was injured at that place while trying to carry the car while in motion, or he was injured by a car in the McKinley line or what is called a street by the name of ... under the car as urged by appellant. That some of the evidence would indicate from the fact that he could not walk with a second amputation. On the other hand physicians have testified both appellants were necessary. It seems from the evidence was injured as he says or he was injured by the ...

carelessness in trying to get aboard a moving car, or he tried to commit suicide by putting himself under the car on the McKinley line.

In support of his contention he is to a certain extent corroborated by his age, his health, his family, and his employment. He ~~is~~^{was} further corroborated by Mrs. Klear and Mrs. Simons, who testify that he was at the office of the husband of the former at about the time he says he was injured and that they saw him going up the street towards Dr. Hams's office. If he was injured, as he says, what followed while he might say was not the most natural thing to do could nevertheless have happened. The appellant introduced the evidence of the conductor and motorman of this car to show that the car did not stop at the place in question and they did not take on passengers at that place and did not see appellee. Also the statements said to have been made by appellee to Dr. Scott that he was hurt while trying to get aboard a moving car. Evidence ~~is~~^{was} introduced showing that Superintendent Johnson of appellant's line inquired of the conductor and motorman of the 8:15 car whether they stopped at Second and Madison Streets. He made this inquiry that night having heard there was an accident at that place. The evidence of appellant as to what occurred on G. Street and that appellee was afterwards under a McKinley car and statements he there made tend to impeach his evidence. The same is true with reference to the extent of his injury and the necessity for the first and second amputation. Dr. Scott, who testified for appellant, and who with Dr. Hams first visited on appellee and assisted in performing the first operation says that appellee for some reason lo-

Development is trying to get around a ruling that, in the case of a company that is not a public company, it will not be able to

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His employment. He is further corroborated by Mrs. Kiser in
 extent corroborated by his age, his health, his family, and
 In support of his contention he is to a certain

Mr. Simon, who finally had to leave the office at 10:30,

and that they saw him going up the street towards Dr. Brown's
place of the former at about the time he says he was injured
and that he was injured on the way. What followed after

of the evidence and testimony of this case to the fact
of the defendant's guilt. The defendant introduced the evi-

The-047 did not show up at the place in question - and they did not take me prisoner as at that place and did not see anything.

1. The first step is to identify the problem or goal. This involves understanding the current situation and what needs to be achieved.

He made this journey that night having heard there was no sign of any more of the missing. The weather was very dark and stormy.

It is noted that the above information was obtained from a confidential source who has provided reliable information in the past.

of his injury and the necessity for the first aid given him.

(d)

elated on having an amputation above the ankle joint, and on a second amputation and offering \$500.00 for it; That the second operation was not necessary: Dr. Scott was the surgeon at the time for appellant company and the Terminal Hospital Association, with other corporations. Drs. Hayward and Hale testify a second amputation was necessary.

The evidence offered by appellant to a great extent goes to the credibility of the evidence offered by appellee, photographs, plats and a controller device called an Outco-toner were introduced by appellant to illustrate and demonstrate the accident did not occur in the way claimed by appellee. The court and jury saw these demonstrations, saw the witnesses and heard them testify and their credibility is peculiarly a matter for the trial court and jury.

This injury happened almost three years ago, ^{and} the evidence has been before this court twice, and unless this court was of opinion that the case ought to be reversed with a finding of fact it would seem to be a useless procedure to reverse for another trial on the ground that the verdict is not in accord with the weight of the evidence. There must be an end to every law suit. There is nothing in the record that the verdict is the result of prejudice or sympathy. If the jury believe the evidence of appellee, his evidence stands alone upon the question of how the injury occurred and will sustain the verdict.

The second proposition of the exclusion of evidence relates wholly to the amount of insurance carried by appellee against accidents and the depositions of Lindquist and Scully with the evidence of Shoemaker were offered for the purpose

...on being in question about the ...
...second
...operation was not necessary; Dr. Scott was the ...
...at the time for appellant company and the Terminal ...
...with other corporations. Dr. ...
...a second ...

The evidence offered by appellant for a great extent
...of the credibility of the evidence offered by ...
...plates and a controller device called an ...
...introduced by appellant to illustrate and ...
...did not occur in the way ... of ...
...The ... and ...
...and heard their testimony and their credibility is ...
...a matter for the trial court and jury.

This injury happened ...
...has been before this court ...
...of opinion that the ...
...of fact it would seem to be a ...
...the ... on the ground that the ...
...not in accord with the weight of the evidence. There must
...and to every law suit. There is nothing in the ...
...the verdict is the result of prejudice or sympathy. It
...the jury believe the evidence of ... the evidence ...
...upon the question of how the injury occurred ...
...the verdict.

The second proposition of the exclusion of evidence
...to the ... of ...
...and the ...
...with the evidence of ...

of showing that a second amputation was unnecessary, as stated by counsel for appellant. This would be immaterial as to the issue as to whether or not appellee received his injury in the manner claimed by him, and if competent at all it would only be competent in mitigation of damages going to the extent of the injury, and while we are of opinion it was error not to admit it for that purpose, we do not think it reversible error because Dr. Scott, a witness for appellant, had testified as to what appellee had to say about insurance.

The errors argued as to the giving of instructions Nos. 3, 5, 6 and 7 given for appellee: Appellant admits in argument that No. 3 has been approved by this court and is proper in form; it is not applicable and misleading as to the facts in this case. We do not see anything either in the instruction or the facts in this case when it is considered with the other instructions to mislead the jury. It is a plain statement of the law and does not direct a verdict. Other instructions given for appellant and appellee explained to the jury the relation of common carrier to passenger.

The appellee's fifth instruction on the measure of damages has been approved by our Supreme Court in the case of Thompson vs. Northern Hotel Co., 350 Ill., 77.

The case cited by appellant, Edward vs. I.R.R.C., 184 App. 107, the instruction was criticized because there was no evidence to base the instruction upon and the objection made does not apply to the case at bar.

The appellee's sixth instruction is limited to the injury alleged in declaration and the words "direct and proximate result" have a meaning that is well understood by the

of showing that a second examination was unnecessary, as the
ad by counsel for appellant. This would be in violation of the
the issue as to whether or not appellee retained his injury in
the manner claimed by him, and if competent at all it would
only be competent in mitigation of damages going to the
fact of the injury, and while we are of opinion that it is
not so much as the first instance, we do not think it
this error because Dr. Thoburn, a witness for appellant, was
testified as to that appellee had to say about his injuries.
The error argued as to the giving of instructions
Nos. 3, 5, 6 and 7 given for appellee's benefit is
argument that Nos. 3 has been approved by this court and is
proper in form, it is not so feasible and misleading as to the
facts in this case. We do not see anything wrong in the in-
struction or the facts in this case when it is considered with
the other instructions as given the jury. It is a fair
statement of the facts and does not direct a verdict. Other
instructions given for appellant and appellee explained to the
jury the relation of common carrier to passenger.
The appellee's fifth instruction on the measure of
damages has been approved by our Supreme Court in the case of
Thompson vs. Northern Hotel Co., 230 Ill. 77.
The case cited by appellant, Brown vs. I.R.R.,
184 App. 107, the instruction was criticized because there
no evidence to base the instruction upon and the objection
was not timely so the case is over.
The appellee's sixth instruction is similar to the
injury alleged in declaration and the words "direct and prox-
imate result" have a meaning that is well understood by the

average man.

The seventh instruction because it directs a verdict and does not state all the elements necessary to a recovery. There is no essential element to a recovery pointed out by appellant that this instruction does not contain. The objection made seems to be a construction put upon the language used. We think the criticism of this instruction without merit.

Appellant's refused instruction was properly refused as by a reading thereof the jury might understand that before the contractual relation of passenger and common carrier would exist it would be necessary for the passenger to have purchased a ticket or have been on board the car with his fare tendered before the relationship was entered into. This is not under all circumstances necessary. If appellee was at a place where the company was accustomed to stop to take on passengers and he was there with the intention of boarding the car and while attempting to carry out that intention by boarding the car he was injured he was at the time of such injury entitled to the protection of the company as a passenger.

There is no reversible error in the exclusion of evidence and the giving or refusing of instructions. The amount of the verdict in this case is not excessive, if under the evidence the appellant is responsible for the injury. The evidence of the surroundings and the way this accident is claimed to have happened is far from making the position of appellee before the court satisfactory. However, applying the usual tests to this verdict that are by courts of appeal usually applied where there is a contrariety of evidence, with evidence if believed by the jury to sustain it, and as in this

The court has held that it is not necessary to show that the defendant was negligent in order to recover damages. The court has held that the defendant's negligence is not a necessary element of a recovery. The court has held that the defendant's negligence is not a necessary element of a recovery. The court has held that the defendant's negligence is not a necessary element of a recovery.

Appellant's negligence is not a necessary element of a recovery. The court has held that the defendant's negligence is not a necessary element of a recovery. The court has held that the defendant's negligence is not a necessary element of a recovery. The court has held that the defendant's negligence is not a necessary element of a recovery. The court has held that the defendant's negligence is not a necessary element of a recovery.

There is no reversible error in the admission of evidence and the giving of instructions. The court has held that the defendant's negligence is not a necessary element of a recovery. The court has held that the defendant's negligence is not a necessary element of a recovery. The court has held that the defendant's negligence is not a necessary element of a recovery. The court has held that the defendant's negligence is not a necessary element of a recovery.

Once a second trial and a second appeal we must hold that the verdict is not against the manifest weight of the evidence and the judgment will be affirmed.

Affirmed.

#####

(Not to be reported in full.)

and this also found in the same place a few days ago, and a second report was made on the 10th.

Specimens were taken from the same place on the 11th and 12th.

Specimens were taken from the same place on the 13th and 14th.

Specimens were taken from the same place on the 15th and 16th.

Specimens were taken from the same place on the 17th and 18th.

(List of specimens taken on the 19th)

Specimens were taken from the same place on the 20th and 21st.

Specimens were taken from the same place on the 22nd and 23rd.

Specimens were taken from the same place on the 24th and 25th.

Specimens were taken from the same place on the 26th and 27th.

Specimens were taken from the same place on the 28th and 29th.

Specimens were taken from the same place on the 30th and 31st.

Specimens were taken from the same place on the 1st and 2nd.

Specimens were taken from the same place on the 3rd and 4th.

Specimens were taken from the same place on the 5th and 6th.

Specimens were taken from the same place on the 7th and 8th.

Specimens were taken from the same place on the 9th and 10th.

Specimens were taken from the same place on the 11th and 12th.

Specimens were taken from the same place on the 13th and 14th.

Specimens were taken from the same place on the 15th and 16th.

Specimens were taken from the same place on the 17th and 18th.

Specimens were taken from the same place on the 19th and 20th.

Specimens were taken from the same place on the 21st and 22nd.

Specimens were taken from the same place on the 23rd and 24th.

Specimens were taken from the same place on the 25th and 26th.

Specimens were taken from the same place on the 27th and 28th.

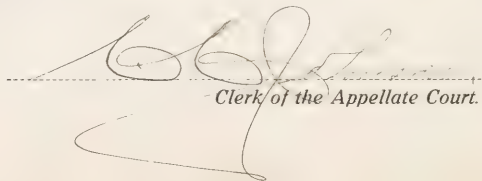
Specimens were taken from the same place on the 29th and 30th.

Specimens were taken from the same place on the 31st and 1st.

Specimens were taken from the same place on the 2nd and 3rd.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

194 A 103

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 103

James H. Co.

~~ERROR TO~~
APPEAL FROM

vs.

No. 56

October Term, 1914.

City COURT

East St. Louis COUNTY

Wm. Ross, Silas & Mfg. Co. etc

TRIAL JUDGE

HON. *R. H. Flannigan*

Term No. 56.

Agenda No. 65.

October Term, A. D. 1914.

The Pioneer Lumber Co.

Appellant,

vs.

Woods Bros. Silo & Mfg. Co.

Appellee.

Appeal from
City Court of
East St. Louis.

Opinion by Harris, J.

Action

~~This is a suit brought by appellant, a corporation,~~
~~against appellee, a corporation, in assumpsit filing a de-~~
~~claration in the common counts with a copy of account and bill~~
~~of particulars. The claim is for three car loads of lumber~~
~~by appellant to appellee at appellee's request. The appellee~~
~~filed the general issue and with it notice of special matters~~
~~in recoupment claiming that appellant was and is indebted to~~
~~appellee in the sum of \$4,807.33. That on the 6th day of~~
~~April, 1914, upon motion of appellant the Court under Sec. 88~~
~~Chapter 110, Hurds Revised Statutes upon the issues so joined~~
~~referred the case to Paul Farthing, as referee for proofs and~~
~~conclusions.~~

~~The referee on the 25th day of May, 1914, filed in~~
~~the trial Court his report of evidence taken and his report~~
~~of findings of fact and law. That he filed with his report~~
~~an order overruling the objections of appellant filed with~~
~~him as referee.~~

~~That on the same day, the 25th day of May, 1914,~~
~~the appellant filed in the trial Court his exceptions to the~~

October Term, A. D. 1914.

Appeal from
City Court of
West St. Louis.

The Missouri Lumber Co.,
Appellant,
vs.
George B. Smith & Co.,
Appellees.

Opinion by Mr. Justice L.

October 1914

This case is presented by appeal from the City Court of West St. Louis.

The appellant, The Missouri Lumber Co., is a corporation organized under the laws of the State of Missouri.

The appellees, George B. Smith & Co., are individuals residing in the City of St. Louis.

The facts of the case are as follows: The appellant, The Missouri Lumber Co., is a corporation organized under the laws of the State of Missouri.

The appellees, George B. Smith & Co., are individuals residing in the City of St. Louis.

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The appellees, George B. Smith & Co., are individuals residing in the City of St. Louis.

referee's report, upon hearing on the 20th day of June, 1914, ^{which were} the exceptions were by the Court sustained as to conclusions, ~~the court finding~~ and overruled as to evidence, ~~A finding by the Court that~~ appellant's claim of \$1,843.60 was balanced by the damages appellee was entitled to recoup. No exceptions were entered or taken to the ^{court} findings. Judgment was entered upon the findings in favor of appellee and against appellant for costs. No exception was taken to the judgment, ^{and the appellant appeals} this was followed on the 6th day of July, 1914, by the order for this appeal in which ~~orders it was recited appellant having entered its exceptions~~ herein, pray an appeal, etc., 30 days was given for filing bond to be approved by clerk and a bill of exceptions was to be filed in 30 days. The appeal bond was approved and filed on the 11th day of August, 1914. ^a No bill of exceptions ^{after time limited} was presented to the trial Judge until the 30 days for filing it ^{which} ~~same~~ had expired, ^{and} the trial Judge because the time had expired, refused to sign the same, ^{and} ~~There has been no bill of~~ exceptions signed and therefore ^{wa} no bill of exceptions made a part of the record ^{on appeal} in this Court.

The record and brief and argument for appellant were filed in this Court on the 27th day of October, 1914, and on the 2nd day of November, 1914, appellee filed his motion to dismiss the appeal for a failure of appellant to file as a part of the record a bill of exceptions signed by the trial Judge. Attached to said motion was a notice to the attorney of appellant of the intention to file such motion accompanied by the affidavit of one of Counsel for appellee that he had served upon appellant by United States Mail a copy of the notice with a true copy of the motion attached on the 1st day of November, 1914.

relates to the record, which was filed in the Court of Appeals on the 15th day of October, 1914, and was filed in this Court on the 27th day of October, 1914, and on the 2nd day of November, 1914, appellee filed his motion to dismiss the appeal for a failure of appellant to file as a part of the record a bill of exceptions signed by the trial judge. Attached to said motion was a notice to the appellant of appellant of the intention to file such motion, accompanied by the affidavit of one of counsel for appellee that he had served upon appellant by United States Mail a copy of the notice with a true copy of the motion attached on the 1st day of November, 1914.

The record was filed and argument for appellant was held in this Court on the 27th day of October, 1914, and on the 2nd day of November, 1914, appellee filed his motion to dismiss the appeal for a failure of appellant to file as a part of the record a bill of exceptions signed by the trial judge. Attached to said motion was a notice to the appellant of appellant of the intention to file such motion, accompanied by the affidavit of one of counsel for appellee that he had served upon appellant by United States Mail a copy of the notice with a true copy of the motion attached on the 1st day of November, 1914.

Appellee refused to sign the same, whereupon appellant filed a bill of exceptions signed and sworn to by the trial judge, which was filed in the Court of Appeals on the 15th day of October, 1914, and on the 27th day of October, 1914, and on the 2nd day of November, 1914, appellee filed his motion to dismiss the appeal for a failure of appellant to file as a part of the record a bill of exceptions signed by the trial judge. Attached to said motion was a notice to the appellant of appellant of the intention to file such motion, accompanied by the affidavit of one of counsel for appellee that he had served upon appellant by United States Mail a copy of the notice with a true copy of the motion attached on the 1st day of November, 1914.

The appella-nt anticipates this motion in his brief under point one and in his argument makes no controversy over the fact that no bill of exceptions has been signed by the trial Judge but insists that none was necessary. Appellant assigns and argues no error on the common law record, ~~but~~ *but contends that the evidence is not* The only error argued by appellant is the sufficiency of the evidence to sustain the judgment. The right of this Court on appeal to examine into the error insisted upon by appellant as to the facts depends upon the ruling upon the motion to dismiss the appeal, which motion was by the Court taken with the case and to be then determined.

Appellant recognizes the rule of practice at common law for so long that the citation of authorities are unnecessary that in order for a party to have the advantage of having a ruling of the trial Court reviewed, except as to matters that appear on the common law record the ruling and the exception taken at the time must be preserved by bill of exceptions signed by the trial Judge. The clerk has never been recognized as the authority for certifying to something that was not properly under the law a part of the records of his office, and as to these matters that is the purpose of a bill of exceptions.

Appellant and the profession generally recognize this to be our rule of procedure, but appellant insists that because we have Sec. 68 of Chapter 110 as a part of the practice act when the Court in its discretion refers a case to a referee the action so far as procedure is concerned is transformed from a case at law to one on the Chancery side, and cites the case of Story vs. De Armond, 179 Ill., 510, in support of his contention, while the similarity of referee and Master

are discussed and the powers of the Court to again refer the case to the referee. There is nothing in this case that would lead to the conclusion that the Court should adopt the Chancery practice.

The case of Partridge vs. Ryan, 35 App. 330 is another case cited by appellant in support of this proposition. An examination of this case adds nothing to the position of appellant as it was a case referred under the old act Chapter 117 Hurd's Revised Statutes and not under Section 68. The point as to practice decided is that a party objecting to a referee's report must first do so by filing objections before the referee if he desires to raise the same point later.

In a recent case, the case of the Sanitary Dist. vs. Munger, 264 Ill. 356, the Court uses some language that appears applicable to this question: "It is argued that the proceeding to condemn is at law, only so far as it relates to awarding compensation but that preliminary proceedings to determine the question of ownership are conducted according to the rules of Chancery practice. This position finds no support in any decision of this Court. We have held in deciding questions of title among various defendants the Court will not be restricted to legal titles but will ascertain the rights of the respective owners in the property appropriated whether such rights are legal or equitable. But this does not change the proceeding from one in law to one in Chancery.

The fact that a Court in a Statutory proceeding recognizes and enforces equitable rights does not change the proceeding from law to Chancery. The action of the Court in

[illegible]

1. The name of the person who made the statement is not known.

[illegible]

The fact that a Court in a Secretary proceeding
recognizes and enforces equitable right does not prevent it
proceeding from day to day. The action of the Court is
(4)

such proceeding is still presumed to be right until error is made to appear, and the burden of preserving the evidence of such error is upon the party complaining of it. In the absence of a bill of exceptions showing all the evidence that was actually heard it will be presumed there was evidence to sustain every finding necessary to sustain the judgment of the court."

This was even after the report of the referee a proceeding in law to be determined according to the rules of practice as in cases at law and a judgment entered at law.

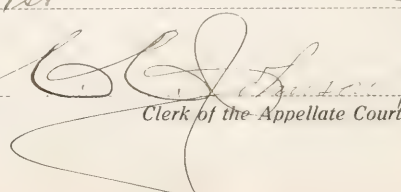
This disposes of the case so far as this Court is concerned. The only error argued being the sufficiency of the evidence to sustain the judgment and without a bill of exceptions preserving the evidence and the exceptions to the judgment as said by the Supreme Court in the case of the Climax Toy Co. vs. American Toy Co., 334 Ill. 179, "This Court has held in a long line of decisions too numerous and too familiar to the profession to require their citation, that in the absence of an exception to the judgment in a case tried by the Court, the sufficiency of the evidence to support the judgment cannot be inquired into upon an appeal." The motion to dismiss appeal denied and the judgment of the City Court is affirmed.

Affirmed.

(Not to be reported in full.)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

94 A111

734

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present: ✓

- ✓ Hon. Thomas M. Harris, Presiding Justice.
- Hon. Harry Higbee, Justice.
- Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 111

ERROR TO
APPEAL FROM

Sargail

vs.

No. 62

October Term, 1914.

Biscuit

COURT

Walash

COUNTY

Mundy Adams

TRIAL JUDGE

HON. Enoch E. Newlin

October Term, A. D. 1914.

Preston Sargent,

Appellant,

vs.

M. H. Mundy, Administrator,
etc.,

Appellee.

Appeal from
Circuit Court of
Wabash County.

Opinion by Harris, J.

~~In February, 1914, a petition was filed by appel-~~
~~lant in the County Court of Wabash County in the Estate of~~
James Sargent, deceased, then in due course of administration,
~~in said court. The petitioner by said petition represents that~~
he is a son and heir at law of James Sargent, deceased, who
~~died the 31st day of March, 1912, and that M. H. Mundy was~~
~~duly appointed administrator of said estate and duly quali-~~
~~fied as such. That petitioner was not indebted to his father~~
~~at the time of his death in the sum of \$985.00 or in any oth-~~
~~er sum. That the report of M. H. Mundy, administrator, made~~
~~and filed in said estate in said court falsely shows among~~
~~the items of receipt the payment by petitioner to said ad-~~
~~ministrator of the said sum of \$985.00. That he did not pay~~
~~said sum or any other sum to said administrator.~~

That the said report falsely shows among other
~~items paid out that said administrator paid to petitioner the~~
~~sum of \$985.00. That he did not pay said sum to petitioner~~
or any other sum as shown by said report.

That said administrator falsely and wrongfully ob-
tained said receipt of petitioner, which purports on its face

October Term, A. D. 1914.

James Sargent,

Appellant,

vs.

M. H. Mundy, Administrator,

etc.,

Appellee.

Appeal from
Circuit Court of
Wash County.

Opinion by Harris, J.

In February, 1912, a petition was filed by James

Sargent in the County Court of Wash County in the Estate of
James Sargent, deceased, then in due course of administration,
in said court. The petition by said Sargent requested that

he be appointed administrator of said estate and that M. H. Mundy be
removed as administrator of said estate and duly qualified

in his stead. That petitioner was not indebted to his father
at the time of his death in the sum of \$385.00 or in any other

sum. That the report of M. H. Mundy, administrator, made
and filed in said estate in said court falsely shows among

the items of receipt the payment by petitioner to said ad-
ministrator of the said sum of \$385.00. That he did not pay

said sum or any other sum to said administrator.
That the said report falsely shows among other

items paid out that said administrator paid to petitioner the
sum of \$385.00. That he did not pay said sum to petitioner

or any other sum as shown by said report.
That said administrator falsely and wrongfully ob-

tained said receipt of petitioner, which purports on its face

to be for \$985.00. *Petitioner*

Prayer for citation against administrator for hearing, the item of \$985.00 stricken from said report and the *Writ* receipt withdrawn and surrendered to petitioner. The administrator, Mandy, entered his special appearance to move to quash citation on the ground the Court did not have jurisdiction. This was followed by special demurrer to the petition. The motion and special demurrer were overruled and defendant filed his answer denying the material allegations of the petition and denying jurisdiction of court. Replication was filed to the answer. A trial in the County Court resulted in finding for petitioner. *which was reversed on* An appeal was taken to the Circuit Court, *by administrator* here the motion to dismiss suit made by administrator was overruled and a trial is now, a jury having been sworn resulted in a finding in favor of administrator and against petitioner, *from which an* and this appeal from the judgment of the Circuit Court *was taken*.

The facts in this case were that James Sargent, a man about 82 years of age, a wife 85 years of age, a son, appellant, 63 years of age and an adopted son, Jimmie Sargent, on June 30, 1911, constituted the family and heirs at law of James Sargent, now deceased. James Sargent, on the 30th day of June, 1911, *was* confined to his bed with sickness and from that time to his death March 21, 1912, was an invalid and very hard of hearing. *That during said time he* On the 30th day of June, 1911, James Sargent sold and conveyed to Charles W. Russell his home place in the City of Mt. Carmel, Madison County, Illinois, for the sum of \$2,000.00, and *from* the proceeds thereof were paid out as follows: *and* \$15.00 for abstract, \$1,000.00 to his wife Gellie Sargent, \$985.00 to his son Preston Sargent. The day before

the transfer ^{the} ~~was made~~ appellant went to the home of James Sargent and solicited the payment to him from the wife and husband of a part of the funds which was to be paid for this ~~xxxxxx~~ property. James Sargent had but little property, and he and his wife were old with but little understanding of business methods. Preston Sargent was not an educated man, can write his name, knows that he got out of the sale ^{of} ~~this~~ property nearly one-half the funds \$985.00 but how he obtained it whether as a gift, a loan or for what purpose his evidence is not satisfactory. ^{show} ~~The appellee was called upon to draft this deed, take the acknowledgment by Charles Russell. He heard the conversations that took place, distributed the money and at the time from the evidence, had no interest in the transaction. There was no objection to the competency of any of these witnesses as to what occurred prior to the death of James Sargent. The Russells, who obtained title to a property that they say is worth from \$3,500.00 to \$4,000.00 for \$2,000.00, have advised appellant in and about this matter and are witnesses in his behalf together with the young man who drove their grocery wagon. Then James Sargent died appellee was appointed administrator of his estate. He was advised of what took place at time of this sale of real estate. That the widow, a second wife, and appellant a son of deceased by a former wife, were not on good terms was apparent. There was no considerable property for distribution. Appellee learned that if appellant kept this \$985.00 and insisted upon a distributive share in the remainder of the estate there would be trouble. Without concealing anything from the heirs he proceeded to have it determined by the parties~~

the transfer was made to the home of the
Sargent and collected the balance to the full amount
amount of \$1000 of the commission was to be paid to the
xxxxxx property. James Sargent had one little property, and
he and his wife were old and had little understanding of
business methods. Preston Sargent was not an educated man,
and wrote his name, knowing that he got out of the sale of the
property nearly one-half the price \$1000.00 but how he ap-
praised it whether as a gift, a loan or for what purpose his
attorney is not certain. The attorney who was appointed to
to take care of the estate of James Sargent was not a lawyer
and was not a member of the bar. He was a layman and was not
qualified to take care of the estate of James Sargent. He was
not a lawyer and was not a member of the bar. He was a layman
and was not qualified to take care of the estate of James Sargent.
There was an objection to the transaction. There was an objection
to the validity of the transaction as to that occurred before
the death of James Sargent. The Russell, who testified
to the fact that they say he gave from \$1000.00 to
\$2,000.00 for \$2,000.00, have advised Russell in and about
this matter and are witnesses in his behalf together with the
young man who drove their grocery wagon. When James Sargent
died appellee was appointed administrator of his estate. He
was advised of what took place at time of this sale of real
estate. That the widow, a second wife, and appellee were
or succeeded by a former wife, was not a good thing for the
estate. There was no considerable property for distribution.
Appellee learned that if appellee kept this \$2000.00 and in-
stead upon a distributive share in the remainder of the es-
tate there would be nothing. The heirs of James Sargent
the heirs he proceeded to have it determined by the parties

themselves whether this \$985.00 was to be considered a part of the estate or not.

The appellee insisted in the court below that the court did not have jurisdiction. This estate was in the course of administration. The parties interested had a right to file objections to the report of the administrator, and if so, a petition to strike an item in the report not properly belonging ~~to~~ init. The appellee has not assigned cross errors on the refusal of the court to dismiss for want of jurisdiction so that the ruling of the court on the motion to dismiss will not be considered.

The Probate Court is clothed with equitable powers and equitable jurisdiction in so far as it may be necessary to adjust the matter in controversy. (Carrington's Estate 124 Ill., 363). Appellant contends that he ought not to have been charged with this \$985.00. While he does not argue it in that way, if under the undisputed evidence it was his, it must be a gift *inter vivos*. Some of the elements necessary to constitute such a gift are that there must be on the part of the donor, an intent to give, and a gift in pursuance of such intent. (Richardson vs. Richardson, 148 Ill., 563). Such a gift must be established by clear proof. (Barnum vs. Reed, 136 Ill. 388). If this application of the law is made to appellant, the petition in this case, and his contention fails because he says he solicited \$1,000.00 of this money and does not claim that James Sargent agreed to give it to him. He says after he obtained it James Sargent said he was glad of it, without saying he was to have it as a gift. Then what really took place or was said about it must have occurred between appellant and Celia Sargent and that evidence could not

themselves whether this \$300.00 can be considered a gift
 of the estate or not.
 The court is divided in its opinion as to whether
 about did not have jurisdiction. The court is divided
 course of jurisdiction. The court is divided
 so this objection to the report of the executor, and it
 no, a petition to establish the claim in the report not properly
 belonged to him. The court is divided
 was on the refusal of the court to dissolve the trust of her
 fiduciary so that the ruling of the court on the action to
 dissolve will not be reversed.
 The Probate Court is clothed with equitable powers
 and equitable jurisdiction in so far as it may be necessary
 to adjust the matter in controversy. (Garrison's Estate 124
 Ill., 363). Appellant contends that he ought not to have
 been charged with this \$300.00. While he does not argue it
 in that way, it seems to me that he is. In fact, it
 must be a gift. In fact, it seems to me that he is. In fact, it
 constitutes such a gift and that there must be on the part of
 the donor, an intent to give, and a gift in pursuance of such
 intent. (Richardson vs. Richardson, 148 Ill., 200). Such a
 gift must be established by clear proof. (Richardson vs. Richardson,
 136 Ill., 368). If this application of the law is made to ap-
 pellant, the petition in this case, and his contention fails
 because he says he collected \$1,000.00 of this money and does
 not claim that James Sargent agreed to give it to him. He
 says after he obtained it James Sargent said he was giving it
 to him without saying he was to have it as a gift. Then what
 really took place was said above it must have occurred be-
 tween appellant and John Sargent and that evidence would not

be reconciled into such a gift when both are considered. The statements made by James Sargent in the presence of the Mus- sels are as much in line with a loan as a gift. The Court properly held this \$985.00 was not a gift.

The next error argued by appellant is the procuring of the receipt in October, 1912, by appellee from appellant and the filing of the report in the County Court October 24, 1912, crediting appellant with payment of \$985.00 and charging him with having received on his distributive share \$985.00.

~~It is urged that appellee, a lawyer, in procuring this receipt took advantage of an ignorant and uneducated man and by falsehood and fraud procured his signature to the receipt. The charge is plain and broad but the evidence of appellant does not sustain the charge as anything else represented to him?~~

Appellant says: Mundy, appellee, about one year after his father's death, on the street, came up and gave him receipt for money. He want the \$985.00. I made no reply. I had three or four talks with him about it. I went to Mundy's office. Do not know that I said anything. He told us to sign my name to the receipt and I signed it. I asked him what Jim had drawn out. Do not remember that he said. I got the Partition note afterwards for \$600.00. After I signed the receipt for \$985.00 people continued to talk about it that if I ought not to have done it. Mundy said he wanted to put everything into court and for me to come over and sign it." Appellee says that he knew from Mrs. Celia Sargent that she thought appellant had received all from the estate that he was entitled to receive. That he had been paid this \$985.00 and agreed to not bother them, James Sargent and wife, any

be recorded into such a gift when both are considered. The
statements made by James Sargent in the presence of the jury
are as much in line with a loan as a gift. The Court
properly held this \$385.00 was not a gift.

The next issue upon which the Court is in disagreement
of the record in October, 1913, by appellee from appellant
and the filing of the report in the County Court October 21,
1913, exonerating appellant with payment of \$385.00 and charging
him with having loaned on his dispositive share \$385.00.
It is urged that appellee, a lawyer, in procuring this re-
ceipt took advantage of his position and unethical means and of

his position as a lawyer to obtain his signature to the receipt.
Appellee is also charged with the violation of the provisions of
the Code of Ethics of the State Bar Association in procuring to him
the receipt.

Appellant says: Kundy, appellee, about one year after his
father's death, on the street, came up and gave him receipt
for \$385.00. He says the \$385.00 was not a gift. I was
three or four days with him at the time. I went to Kundy's old
home. He told me that I was right. He told me to sign
the receipt and I signed it. I asked him what Jim
had done. He told me that he had done nothing. I got the bank
book and saw that \$385.00 was paid. I signed the receipt.

I said for \$385.00 Kundy's father had paid about it that if I
ought not to have done it. Kundy said he wanted to put every-
thing into money and for us to come over and sign it. He
told me that he was from Mrs. Dallas Kundy and that he
thought appellant had received all from the estate that he
was entitled to receive. That he had paid him \$385.00
and agreed to not bother him. James Sargent and appellee

more. That he, appellee, knew that if appellant received his distributive share in the estate and did not return this \$985.00 there would be trouble. That he talked to appellant about what he had received and what he would receive and appellant signed the receipt and the entries were made on the report accordingly. That he, appellee, had distributed to widow, adopted son and appellant on the basis of the \$985.00 being a part of the estate and if it is not, the parties not having much property, he will lose a large portion of the amount.

It was not necessary to make this a valid transaction that the actual cash should be passed from one party to the other. There was a sufficient consideration to support what was done. It was the duty of the administrator to collect the funds belonging to the estate of James Sargent even if they were due from members of the family, and this he did and the estate has had the benefit of his services, without misconduct on his part so far as the evidence discloses.

The trial court heard and saw the witnesses and the decree of circuit court dismissing petition being in accord with the evidence and the law will be affirmed.

Affirmed.

#####

(Not to be reported in full.)

were. That Mr. [illegible] had said in his deposition that the
dispositive share in the estate and did not receive the
\$200.00 share - could be [illegible]. That he failed to [illegible]
about what he had received and that he would receive and [illegible]
[illegible] against the receipt and the [illegible] [illegible] [illegible]
report accordingly. That [illegible] [illegible] [illegible]
[illegible] adopted son and [illegible] on the [illegible] of the [illegible]
before a part of the [illegible] and it is [illegible] [illegible] [illegible]
having such [illegible], he will lose a large portion of the
[illegible].

If it was not necessary to make this a valid [illegible]
claim that the actual cash should be passed from one [illegible] to
the other. That [illegible] [illegible] consideration be [illegible]
[illegible] [illegible]. It is the [illegible] of the [illegible] [illegible]
[illegible] [illegible] [illegible] in the [illegible] of [illegible] [illegible] [illegible]
if they were due from members of the family, and this he did
and the estate has had the benefit of his services, without
[illegible] to his [illegible] [illegible] [illegible] [illegible].

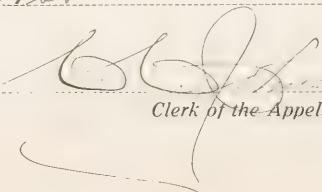
The trial court heard and saw the witnesses and the
[illegible] of circuit court [illegible] petition being in record
[illegible] the evidence and the [illegible] [illegible].

[illegible]

(Not to be reported in full.)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

INION

94 A113

735

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 113

Marion Adams
et al.

ERROR TO
APPEAL FROM

vs.

No. 66

Circuit COURT

October Term, 1914.

Marion COUNTY

L. B. R. Co.

TRIAL JUDGE

HON. *Thomas M. Jell*

Term No. 68.

Appendix No. 53.

October Term, A. D. 1914.

D. B. Haynie, Administrator of
the Estate of Arthur Greenlee,
deceased,

vs.

Illinois Central Railroad

Company,

Appellee,

Appellant.

Appeal from the
Circuit Court of
Marion County.

Opinion by Harris, J.

Action by D. B. Haynie against the Defendant
This is a writ brought by appellee for \$10,000.00

for the benefit of the next of kin of the deceased for the
willful killing of Arthur Greenlee. *The second count is*
for the plaintiff the defendant's appeal
~~The first trial is had consisted of five counts. The first~~
~~count in first and second in substance that on the 30th day of~~
~~August, 1913, the appellant (its force and arms) caused and~~
~~caused to be made upon appellee's intestate an assault, and~~
~~then and there through and by its servant, one who while in~~
~~the course of his duty and within the scope of his employment,~~
~~shot off a certain pistol then and there loaded, etc., at~~
~~Arthur Greenlee and wounded him in so so grievous a manner~~
~~that he languished until the 30th day of August, 1913, at~~
~~which time he died as a result of said wounds. Averment of~~
~~damages and next of kin.~~

The second count in trespass on the case charges
that appellant is the owner of a certain railroad yard and
various railroad tracks in the north part of the City of
Centralia and other connecting lines. That among appel-
lant's employees was one Harry Warren, employed as a private
watchman or detective and stationed by appellant in

1950-1951

[illegible]

U. D. HANSEN, JR.,
and
J. D. HANSEN, JR.

1. *Chrysomelidae*

122

11110042 Twentieth Century

10

1990

[Faint, illegible handwriting]

FOR THE BOARD OF DIRECTORS

1975-1976, 1976-1977, 1977-1978, 1978-1979, 1979-1980, 1980-1981, 1981-1982, 1982-1983, 1983-1984, 1984-1985, 1985-1986, 1986-1987, 1987-1988, 1988-1989, 1989-1990, 1990-1991, 1991-1992, 1992-1993, 1993-1994, 1994-1995, 1995-1996, 1996-1997, 1997-1998, 1998-1999, 1999-2000, 2000-2001, 2001-2002, 2002-2003, 2003-2004, 2004-2005, 2005-2006, 2006-2007, 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018, 2018-2019, 2019-2020, 2020-2021, 2021-2022, 2022-2023, 2023-2024, 2024-2025, 2025-2026, 2026-2027, 2027-2028, 2028-2029, 2029-2030, 2030-2031, 2031-2032, 2032-2033, 2033-2034, 2034-2035, 2035-2036, 2036-2037, 2037-2038, 2038-2039, 2039-2040, 2040-2041, 2041-2042, 2042-2043, 2043-2044, 2044-2045, 2045-2046, 2046-2047, 2047-2048, 2048-2049, 2049-2050, 2050-2051, 2051-2052, 2052-2053, 2053-2054, 2054-2055, 2055-2056, 2056-2057, 2057-2058, 2058-2059, 2059-2060, 2060-2061, 2061-2062, 2062-2063, 2063-2064, 2064-2065, 2065-2066, 2066-2067, 2067-2068, 2068-2069, 2069-2070, 2070-2071, 2071-2072, 2072-2073, 2073-2074, 2074-2075, 2075-2076, 2076-2077, 2077-2078, 2078-2079, 2079-2080, 2080-2081, 2081-2082, 2082-2083, 2083-2084, 2084-2085, 2085-2086, 2086-2087, 2087-2088, 2088-2089, 2089-2090, 2090-2091, 2091-2092, 2092-2093, 2093-2094, 2094-2095, 2095-2096, 2096-2097, 2097-2098, 2098-2099, 2099-2100, 2100-2101, 2101-2102, 2102-2103, 2103-2104, 2104-2105, 2105-2106, 2106-2107, 2107-2108, 2108-2109, 2109-2110, 2110-2111, 2111-2112, 2112-2113, 2113-2114, 2114-2115, 2115-2116, 2116-2117, 2117-2118, 2118-2119, 2119-2120, 2120-2121, 2121-2122, 2122-2123, 2123-2124, 2124-2125, 2125-2126, 2126-2127, 2127-2128, 2128-2129, 2129-2130, 2130-2131, 2131-2132, 2132-2133, 2133-2134, 2134-2135, 2135-2136, 2136-2137, 2137-2138, 2138-2139, 2139-2140, 2140-2141, 2141-2142, 2142-2143, 2143-2144, 2144-2145, 2145-2146, 2146-2147, 2147-2148, 2148-2149, 2149-2150, 2150-2151, 2151-2152, 2152-2153, 2153-2154, 2154-2155, 2155-2156, 2156-2157, 2157-2158, 2158-2159, 2159-2160, 2160-2161, 2161-2162, 2162-2163, 2163-2164, 2164-2165, 2165-2166, 2166-2167, 2167-2168, 2168-2169, 2169-2170, 2170-2171, 2171-2172, 2172-2173, 2173-2174, 2174-2175, 2175-2176, 2176-2177, 2177-2178, 2178-2179, 2179-2180, 2180-2181, 2181-2182, 2182-2183, 2183-2184, 2184-2185, 2185-2186, 2186-2187, 2187-2188, 2188-2189, 2189-2190, 2190-2191, 2191-2192, 2192-2193, 2193-2194, 2194-2195, 2195-2196, 2196-2197, 2197-2198, 2198-2199, 2199-2200, 2200-2201, 2201-2202, 2202-2203, 2203-2204, 2204-2205, 2205-2206, 2206-2207, 2207-2208, 2208-2209, 2209-2210, 2210-2211, 2211-2212, 2212-2213, 2213-2214, 2214-2215, 2215-2216, 2216-2217, 2217-2218, 2218-2219, 2219-2220, 2220-2221, 2221-2222, 2222-2223, 2223-2224, 2224-2225, 2225-2226, 2226-2227, 2227-2228, 2228-2229, 2229-2230, 2230-2231, 2231-2232, 2232-2233, 2233-2234, 2234-2235, 2235-2236, 2236-2237, 2237-2238, 2238-2239, 2239-2240, 2240-2241, 2241-2242, 2242-2243, 2243-2244, 2244-2245, 2245-2246, 2246-2247, 2247-2248, 2248-2249, 2249-2250, 2250-2251, 2251-2252, 2252-2253, 2253-2254, 2254-2255, 2255-2256, 2256-2257, 2257-2258, 2258-2259, 2259-2260, 2260-2261, 2261-2262, 2262-2263, 2263-2264, 2264-2265, 2265-2266, 2266-2267, 2267-2268, 2268-2269, 2269-2270, 2270-2271, 2271-2272, 2272-2273, 2273-2274, 2274-2275, 2275-2276, 2276-2277, 2277-2278, 2278-2279, 2279-2280, 2280-2281, 2281-2282, 2282-2283, 2283-2284, 2284-2285, 2285-2286, 2286-2287, 2287-2288, 2288-2289, 2289-2290, 2290-2291, 2291-2292, 2292-2293, 2293-2294, 2294-2295, 2295-2296, 2296-2297, 2297-2298, 2298-2299, 2299-2300, 2300-2301, 2301-2302, 2302-2303, 2303-2304, 2304-2305, 2305-2306, 2306-2307, 2307-2308, 2308-2309, 2309-2310, 2310-2311, 2311-2312, 2312-2313, 2313-2314, 2314-2315, 2315-2316, 2316-2317, 2317-2318, 2318-2319, 2319-2320, 2320-2321, 2321-2322, 2322-2323, 2323-2324, 2324-2325, 2325-2326, 2326-2327, 2327-2328, 2328-2329, 2329-2330, 2330-2331, 2331-2332, 2332-2333, 2333-2334, 2334-2335, 2335-2336, 2336-2337, 2337-2338, 2338-2339, 2339-2340, 2340-2341, 2341-2342, 2342-2343, 2343-2344, 2344-2345, 2345-2346, 2346-2347, 23

1000

1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

100-443887-100

...and to show the ...

The second count is repeated at times because of

that specialist is the only one

V-1000 received 27,000 in 1964 and 28,000 in 1965.

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1. The following information was obtained from the files of the FBI:

... always stop or tentative ...

and near the said yards, where said duty is and under his said employment to exercise watchfulness in and over the said yards of appellant, to discover and endeavor to discover any person or persons committing any depredations against the property of appellant; to expel trespassers from the premises of appellant; to ascertain the identity of persons passing over and along said premises; to arrest and turn over to the peace officers any such person or persons as he might detect in the act of committing any act of depredation against the property and upon the premises of appellant and to do general police duty in connection with the premises and business of the appellant in and about said railroad yards. And the appellant then and there armed and caused to be read said servant with a pistol for the purpose of his employment.

That on the date aforesaid Arthur Greenlee was passing over and along said yards on his way from Centralia to the village of Odin between the hours of twelve and one o'clock in the night time in company with two other young men, who were all conducting themselves in a lawful, peaceable and quiet manner, and while said Arthur Greenlee was on said premises for no purpose of depredation and having committed no act against the property of appellant and having no intention of so doing but was upon the premises of appellant for the sole and only purpose of traveling from Centralia to the village of Odin. It became the duty of appellant to so conduct itself in the premises as to refrain from intentionally injuring the said Arthur Greenlee. The appellant did not regard its duty in that behalf and while Arthur Greenlee was conducting himself as aforesaid, at the time aforesaid,

Harry Warren employed by appellant in the line aforesaid and in furtherance of the business of appellant in attempting to ascertain where Arthur Greenlee was going and to ascertain the identity of said intestate and in attempting to assist the said intestate, from the premises of appellant, which was then and there in line with his duty under said employment, then and there wantonly discharged at and towards the said intestate the pistol with which he, said Harry Warren, was then and there armed and caused, allowed and permitted to be armed by appellant for the purpose of said employment and with which to interfere and carry out his said employment and his duties thereunder, while the said intestate was running away and endeavoring to escape from the said servant and quit the premises of appellant, then and there shot said intestate in the back from which wound he died on August 23, 1913, some averment as to next of kin and damages as in the first count.

The third count that appellant had divers employees, among whom were two certain men whose names were unknown to appellee, employed as private watchmen, etc., in other respects averments of third count were same as second count.

The fourth count was withdrawn by appellee at close of appellants' evidence and will not be considered.

The fifth count the same in substance as second and third counts.

A general and special demurrer to this amended declaration was overruled. Appellant filed the general issue and three special pleas.

The first special plea was overruled.

The second that appellee's intestate was a free-

The first witness called was the defendant, who testified that he was the owner of the property in question and that he had been in possession of it for some time. He further testified that he had been in possession of it for some time and that he had been in possession of it for some time.

plever.

The third that appellee's testimony, while inconsistent, was on account of Harry Warren, a witness of appellant.

Issues was joined on these points and a trial at the January Term, 1914, by jury resulted in verdict in favor of appellee for sum of \$1,500.00. Motion for new trial sustained and a trial at April Term, 1914, by a jury resulted in verdict for appellee in sum of \$771.10. A motion for new trial overruled. Judgment on verdict and this appeal.

Appellant in its assignment of errors gives numerous reasons why this judgment should be reversed. The ~~last~~ ^{present} takes up a number of these that are insisted upon as reversible errors such as the giving and refusing of instructions, admission of evidence and the refusal of the court to admit proper evidence, and the limitation of cross examination and refusal of the court to give the peremptory instruction at the close of evidence for appellee and again at the close of all the evidence. The last error mentioned is the important one and if sustained disposes of all other errors and complaints. The facts in this case will be referred to to determine whether or not under the undisputed evidence and the declaration appellee can recover. If there is a dispute about the facts they should be submitted to a jury. If, however, upon the undisputed facts appellee could not recover, it becomes a question of law for the court. What are the facts from the evidence and upon which appellee claims a right to recover. *The jury should*

As to the employment of Harry Warren by appellant

[illegible]

and his duties as have the evidence offered by appellees of
witnesses J. D. Blucher, Charles W. Varsell and Lucian Pea-
ley, special agent of appellant, Sheriff of Marion County and
Deputy Sheriff, respectively, in substance: That Harry War-
ren was employed by appellant at Centralia Terminal known as
the yards. He was on night duty in the yards to keep tres-
passers off of the property, protect the company's property
and prevent men from stealing merchandise and material. He
had no duties in making arrests, he was not sworn in as an
officer. He was to inquire what the business of trespassers
were and if they had none it was his business to get them to
leave. If he found anybody on the right of way he thought
was interfering with the company's property it was his duty
to notify the watchman in charge and cause him to be arrest-
ed and turned him over to the police officers. *He did not*
authorize him to go to the yard to arrest any one who violated the laws
that he carried a weapon.
in his presence within those borders or report it to the of-
ficials.

The evidence of ~~that occurred at the time he was~~
did not show that was present
together with his wife
for the appellee by the witnesses James Greenlee and James
Bain, the young men who were in the company of deceased at
that time. They say they, with deceased, between twelve and
one o'clock at night started to walk from Centralia to Oslin,
and *while passing* were walking north through the yards along the main track
of appellant. The two witnesses were about eight feet in
front of deceased, Arthur Greenlee; that they were met by
Harry Warren, *whom they did not know.* *That*
young man unknown to any of them at that time. One of the
witnesses ~~say~~ he spoke to Warren as they met but that he,
Warren, made no reply and then he was opposite Arthur Greenlee,

~~That~~
he, Warren spoke to Arthur Greenlee asking him what he had
on him; that he had a flash light in his hand and was shining
the light on my brother Arthur Greenlee; he ~~stated~~ ^{what} ~~that~~ ^{he}
flew, and he, Warren, pulled a gun out of his pocket. Arthur
Greenlee started to run off the track, running pretty near
east, a little bit north. The man who had the light and the
~~when Warren~~ ^{gun} fired one or two shots at Arthur Greenlee. Then he ran
after him and fired ~~some~~ ^{more} shots. Arthur Greenlee could not
~~have been far away when first shots were fired. Witnesses~~
~~could not tell he far. Five or six shots were fired by this~~
~~fellow at my brother. That Arthur Greenlee was shot in back~~
~~from which wound he died, leaving his mother, brother and sis-~~
~~ters at west of him.~~

The appellant, after the evidence of appellee was
closed, entered its motion to exclude the evidence and in-
struct the jury to find defendant not guilty.

This presents the question as to whether or not un-
der this state of facts appellee could recover. Admitting
Harry Warren was a watchman of appellant and fired the shot
that caused the death of Arthur Greenlee, ~~at~~ ^{as} he at the time
acting within the general scope of his employment. The trial
court in its instructions to the jury in appellant's instruc-
tion number twenty answered this question in the negative and
that the law as given in that instruction is the law govern-
ing this case. "If you further believe from the evidence in
this case that Arthur Greenlee was accosted by the watchman
Warren and thereupon immediately started peaceably to leave
the premises of the defendant and if you further believe from
the evidence that the said Arthur Greenlee continued to go
east off of the right of way and that he was about to leave

[illegible][illegible]

the same and that the watchman Harry Warren wantonly without lawful excuse or authority and merely to satisfy some personal spite feeling or anger toward the said Arthur Greenlee or his companions, fired the pistol in the direction of Arthur Greenlee and inflicted the wound of which the said Arthur Greenlee afterwards died, and that such act on the part of the watchman Warren was not necessary or proper in the protection of the cars in said yards nor done in the pursuance of any duty in that respect, and not in line of his duty as a watchman, the plaintiff is not entitled to recover in this case, etc."

This instruction was given upon the theory that there was some question of fact to be found by the jury as to whether or not Arthur Greenlee was peaceably at the time leaving premises of appellant, whether or not Warren was at the time in line of his duty as watchman. There is no dispute upon these questions from appellee's own evidence. Arthur Greenlee was committing no crime, was not armed and was getting away as rapidly as possible, and from the evidence of appellee Warren was not a police officer, saw no crime committed, was not armed under instruction or to the knowledge of appellant and had no authority over a trespasser except to invite him to leave or report him. This man was leaving so his authority and his duty as watchman ceased. That he did afterwards was on his own responsibility. If this be true and the instruction was the law it should have been given at the close of plaintiff's evidence in the form of a peremptory instruction.

The appellant offered evidence that when these three men after being accosted started to run in opposite directions, they drew revolvers and commenced to fire at the

watchman, if true and the watchman returned the fire does not in any way strengthen the contention of appellee. The retreating of the trespassers was all under the evidence that was in the line of duty of the watchman, the returning of the fire was either through anger or for the protection of his own person and not for the protection of property of appellant.

"The law does not imply any authority, from the master to the servant, to commit an assault upon a person who is not injuring or threatening to injure the master's property and who is not interfering with the servant's performance of his duty to his master." (Belt Ry. Co. Vs. Banicki, 102 App., 6-48).

Appellee recognized this rule of law when he filed his amended declaration and averred that the watchman was armed and caused or permitted to be armed by the appellant. Appellee recognized that it was necessary to bring home knowledge of the fact to appellant that this watchman was armed and that it was for the protection of appellant's property. This was a material averment, capable of proof and upon which a verdict could not rest on a mere presumption. There was no evidence of any such authority either express or implied.

The case of the Belt Ry. Co. vs. Banicki, Supra, cited by appellant is discussed by appellee. Appellee says first the court in that case recognized the fact that there was a question of fact for the jury to pass upon but reverse the case because the court refused to give an instruction that was given in this case, that is true as to what was actually done. However, the court in that case did not have the opportunity nor was the court called upon to determine whether

...in any way strengthened the position of the defendant. The defendant
...ing of the first case, the defendant was not under the obligation to
...the line of duty of the defendant, the defendant was not
...was either through negligence or for the protection of the
...person and not for the protection of property of another.
...The defendant was not under the obligation to
...master to the servant, he was not under the obligation to
...who is not injured or threatened to injury the defendant
...properly and who is not interfering with the defendant's
...performance of his duty as his master. (Held No. 10, 1911.)

Appellate recognized this rule in the case of
his amended declaration and averred that the defendant was
ed and caused or permitted to be done by the defendant. Ap-
pelles recognized that it was necessary to bring some evi-
dence of the fact to appellant that this statement was true
and that it was for the protection of appellant's property.
This was a material averment, capable of proof and denial.
A verdict could not rest on a mere presumption. There was
no evidence of any such authority either express or implied.
The case of the Bell Ex. Co. vs. Bell, 100, 1911, is
ed by appellant is discussed by appellee. Appellee says that
the court in that case recognized the fact that there was a
question of fact for the jury to pass upon and reverse the
case because the court refused to give an instruction that
was given in this case, that is true, but it was not
done. However, the court in that case did not do so and the
court in this case called upon the defendant to bring evidence

or not a peremptory instruction should have been given; it is evident from the facts as stated in the opinion and the law laid down by the court as applicable to these facts, if that had been the question to determine it would as it did, in effect, hold the master not responsible. This authority upon the facts is a case on all fours with the case at bar and so recognized by appellee, because appellee says in conclusion on that branch of the case: "We do not believe the case relied upon by appellant (referring to the Belt Ry. case) in this respect should or will control the court in deciding this case because we do not think the rules there announced are good law."

Then follows a page or so of argument giving appellee's conclusions as to a distinction between the facts in the two cases and that the court did not hold that upon the facts it was a question of law. But no space is given to a discussion of the law as there determined by the court in an effort to show that it is not in harmony with the law as laid down in other jurisdictions. This authority is based upon and in harmony with I.C.R.R.Co. vs. Rosa, 31 App., 170; Golden vs. Newbrand, 52 Iowa, 59; Brown vs. Boston Ice Co., 175 Mass., 103.

There is no dispute about the law. The master in this state is responsible for the acts of its servant done within the general scope of his employment whilst engaged in the master's business with a view of furtherance of that business whether he acts wilfully or wantonly. The converse of this must be true that he is not liable for the acts of his servant not within the scope of his employment. Applied to the facts in this case this means that when Harry Warren, a

watchman for appellant, armed without the knowledge or permission of appellant and not an officer of the law accosted Arthur Greenlee on the premises of appellant and asked him what he had on him and fired a flash light and Greenlee peaceably started to run and get off of the premises of appellant and the watchman after Greenlee started to run and get off the premises fired the shot that resulted in the death of Greenlee, *he was not acting within the scope of his employment.*

The same is true if it be taken that the watchman after these three trespassers were getting off the premises, firing at the watchman as they left, returned the fire and inflicted the wound that caused the death of said Greenlee.

We have not taken up the amount of this verdict or how it was arrived at by the jury, the character or reputation of these boys that were trespassing, nor the other errors which in the argument of appellant have been given such time and space, as a consideration of them would serve no good purpose in view of the fact that while we adopt the views of the trial court as to the law of the case contained in the instruction when that law is applied to the undisputed facts there is no question of fact to try and for the error of the trial court in refusing to give the peremptory instruction the judgment will be reversed with a finding of fact.

Reversed with finding of fact. .

We find the following fact to be made and entered as a part of the judgment in this case:

That the watchman firing the shot which caused the death of Arthur Greenlee was not at the time acting within the scope of his employment and appellant is not responsible for the act.

#####

(Not to be reported in full.)

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...of ...
...on the ...

...to ...
...to ...
...the ...

...the ...
he was not acting within the scope of his employment

...the ...
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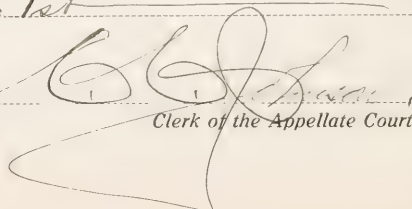
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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

194 A 115

736

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

- Hon. Thomas M. Harris, Presiding Justice.
- Hon. Harry Higbee, Justice.
- Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 115

Findy

ERROR TO
APPEAL FROM

vs.

No. 68

Circuit COURT

October Term, 1914.

Clay COUNTY

Binder

TRIAL JUDGE

HON. *Thomas M. Harris*

Term No. 68.

Agenda No. 47.

October Term, A. D. 1914.

Ellen Finty,)
Appellant,)
vs.)
J. G. Kinder,)
Appellee.)

Appeal from
Circuit Court of
Clay County.

Opinion by Harris, J.

Appellant filed in the Circuit Court her bill in chancery asking for specific performance of a written agreement, for injunction and relief. [The allegations of the bill are in substance: That appellant was the owner of three lots in Xenia, Illinois, on which were store buildings and warehouses, known as the "Finty Stores." That appellee by contract in writing of date June 2, 1911, purchased the stock of goods in this store, and in the contract of purchase and as a part thereof was the following clause which is the foundation of this proceeding: "At the time of the adjustment (which may be between the dates of July 5th and July 15th, 1911), a regular bill of sale for said stock is to be given and a lease on the buildings in which it is located, for a term of five years, is to be made and entered into on the part of the said J. G. Kinder and Miss Ellen Finty, the owner of the property, at Seven hundred Eighty Dollars per annum, payable in monthly installments of Sixty-five Dollars each, falling due on the first day of each month thereafter for the full term of the time."]

The word adjustment, as used in the above paragraph of said agreement from the contract, refers to the time of in-

The word adjustment, as used in the above paragraph full term of the time."

of the property, at seven hundred eighty dollars per annum, payable in monthly installments of sixty-five dollars each, falling due on the first day of each month thereafter for the part of the said J. G. Kinder and Miss Ellen Winty, the owner term of five years, to be made and entered into on the and a lease on the buildings in which it is located, for a 1911), a receipt bill of sale for said stock is to be given (which may be between the dates of July 25th and July 1911, date of this proceeding: "At the time of the adjustment as a part thereof was the following clause which is the form of goods in this store, under the contract of purchase and first in writing of date June 2, 1911, purchased the stock houses, known as the "Tinty Stores." That appellee by con- in Xenia, Illinois, on which were store buildings and ware-

are in substance: That appellant was the owner of three lots ment, for information and relief. The allegations of the bill chancery asking for specific performance of a written agree- Appellant filed in the Circuit Court her bill in Opinion by Harris, J.

J. D. Kinder & Co.
Appellees.
vs.
Ellen Winty,
Appellant.

Appellant from
Circuit Court of
Clay County.

October Term, A. D. 1914.

Page 10. 22.

voice and transfer of the stock of goods, with this explanation this paragraph of the agreement stands alone and the rights of the parties are to be determined thereunder. The bill alleged that appellee in pursuance of the terms of the agreement took possession of the premises July 15, 1911, That appellant has always been ready and willing to perform her part of the agreement to lease the premises, That she caused a draft of lease to be made and tendered to appellee July 15, 1911, but he refused to accept the same; That appellee about December, 1913, gave appellant notice of his intention to vacate the premises; That appellee was a resident of the State of Missouri; That unless appellee was enjoined by order of Court he would remove the remainder of his stock of goods and refuse to execute the lease, and that he was about to vacate the premises so that appellant would have no relief for the balance of the rent.

The prayer of the bill was for specific performance, for injunction until contract was performed, and for relief.

A temporary injunction was issued but afterwards by stipulation dissolved by order of Court and is not to be further considered.

A demurrer to bill was overruled, the answer of appellee admitting that he entered into the contract in question; That he entered into the possession of the premises on July 15, 1911, and occupied the same until the 15th day of December, 1913; That he offered to execute a lease with appellant in compliance with his understanding and agreement with but appellant refused to accept same, and by reason thereof he was discharged of any liability on that account, and that the appellant is barred from relief because of her laches and delay in filing

and transfer of the stock of goods, with this understanding that this paragraph of the agreement stands alone and the rights of the parties are to be determined thereunder. The bill alleges that appellee in pursuance of the terms of the agreement took possession of the premises July 18, 1911, that appellee has always been ready and willing to perform her part of the agreement to leave the premises; that she caused a draft of lease to be made and tendered to appellee July 18, 1911, but he refused to accept the same; that appellee about December, 1913, gave appellee notice of his intention to vacate the premises; that appellee was a resident of the State of Missouri; that unless appellee was enjoined by order of Court he would remove the remainder of his stock of goods and refuse to execute the lease, and that he was about to vacate the premises so that appellee would have no relief for the balance of the term. The prayer of the bill was for injunctive relief, for injunction until contract was performed, and for relief. A temporary injunction was issued but afterward by stipulation dissolved by order of Court and is not to be further considered. A demurrer to bill was overruled, the answer of appellee was entered into the possession of the premises on July 18, 1911, and occupied the same until the 28th day of December, 1913. That he offered to execute a lease with appellee in compliance with his understanding and agreement with her but appellee refused to accept same, and by reason thereof he was disbarred of any liability on that account and that the appellee is barred from relief because of her laches and delay in filing

bill. Replication was filed, evidence heard in open court. A finding for appellee and a decree dismissing bill for want of equity.

The facts that are not in dispute are sufficient to a proper consideration and decision of this case. [The written agreement between the parties containing the paragraph with reference to the leasing of these premises was for the sale of a stock of goods in the building in question sold by appellant to appellee and settled for by appellee. Appellee took possession of the premises in question July 15, 1911, and occupied the same until December 25, 1913, and paid appellant each month the sum of \$85.00 as rent therefor during the time he occupied same. That about the 15th day of July, 1911, appellant caused to be prepared a lease for said premises with the provision against sub-letting the premises and a provision at the time of the termination of the lease the fixtures were to be turned back to appellant in as good condition as the same were at the time of leasing, usual wear excepted. This lease was submitted to appellee and he refused to execute same. Appellee in turn, about same time, submitted to appellant a lease permitting sub-leasing and a clause that appellant was to make repairs; and that appellee was not to be held responsible for breakage or destruction of property and fixtures. The matter of entering into lease was then dropped until December, 1913, when appellant presented a lease, omitting clauses that were before objectionable. This lease appellee refused to accept.]

The reasons argued by appellant for a reversal of this decree can be considered under the third assignment of errors "The court erred in finding the issues for appellee

bill. Application was filed, evidence heard in open court.
a finding for appellee and a decree dismissing bill for want
of equity.

The facts are as in bill and application to
proper consideration and decision of this case. The bill

an agreement between the parties containing the following

with reference to the leasing of these premises was for the
sale of a stock of goods in the building in question sold by
appellee to appellee and settled for by appellee. Appellee

took possession of the premises in question July 1, 1911, and

occupied the same until December 25, 1913, and paid appellee
each month the sum of \$5.00 as rent thereafter during the time
he occupied same. That about the 15th day of July, 1911, ap-

pellant caused to be prepared a lease for said premises the

the provision against sub-letting the premises and a provision

at the time of the termination of the lease the fixtures were

to be turned back to appellee in as good condition as the

same were at the time of leasing, usual wear excepted. This

lease was submitted to appellee and he refused to execute same.

Appellee in turn, about same time, submitted to appellant a

lease permitting sub-letting and a clause that appellant was

to make repairs; and that appellee was not to be held respon-

sible for breakage or destruction of property and fixtures. The

matter of entering into lease was then dropped until December,

1913, when appellant presented a lease, omitting clause that

was before objectionable. This lease appellee refused to

execute.

The reasons argued by appellant for a reversal of

this decree can be considered under two main headings: 1.

error. "The court erred in finding the issues for appellee

and in failing to find the issues for appellant."

If there is competent evidence to sustain this decree it will be presumed the trial court did not consider incompetent evidence in arriving at its conclusions. There is no claim made in the argument of appellant that the court refused to admit competent evidence and any error in regard thereto is waived.

The jurisdiction of a court of equity to enforce specific performance of a contract for a lease depends upon the facts averred in the bill. It is not on the same ground that a court takes jurisdiction of a contract involving a freehold, but is upon the averments in the bill that the party entitled to possession under the agreement is out of possession, that to ~~rely~~ rely upon the remedy at law entails and expensive litigation, multiplicity of suits, irreparable injury, etc., or some of those elements. (McFarland vs Williams, 107 Ill.33).

The bill in this case contained none of these averments, all that was sought was the rent under the agreement for the remainder of the five year period for which appellant had an adequate remedy at law. If a court of equity within its discretion took jurisdiction what right has appellant to specific performance? She claims appellee agreed to enter into lease with her for five years for sum of \$780.00. If the premises, were sufficiently described, did the agreement contain the other elements necessary to show a meeting of the minds upon the leasing, the court is still left to find from the evidence what kind of a lease was intended by the parties and taking what they did in reference thereto at the time with reference to tendering each other proposed leases, demonstrates

...is failing to find the issue for appellant.
...It is impossible to say that the
...it will be presumed the trial court did not consider
...inconsistent evidence in arriving at its conclusions. There
...is no claim made in the argument of appellant that the court
...refused to admit competent evidence and that it was
...abstained from doing so.
The jurisdiction of a court of equity to enforce
specific performance of a contract for a lease is well
the facts averred in the bill. It is not on the same ground
that a court takes jurisdiction of a contract involving a
leasehold, but is upon the grounds in the bill that the party
entitled to possession under the agreement is not in possession
and that to make fully upon the remedy at law means an
and separate litigation, multiplicity of suits, injury,
injury, etc., or some of those elements. (McFarland vs. Wil-
liams, 107 Ill. 33.)
The bill in this case contained none of these aver-
ments, all that was sought was the rent under the agreement
for the term of the five year lease for which appellant
had an adequate remedy at law. If a court of equity within
its jurisdiction took jurisdiction what right has appellant to
specific performance? She claims appellant agreed to enter
into lease with her for five years for sum of \$500.00. If the
premises were sufficiently described, did the agreement con-
tain the other elements necessary to show a breach of the
lease upon the leasing, the court is still left to find from
the evidence what kind of a lease was intended by the parties
and taking what they did in reference thereto at the time with
reference to forbidding each other proposed leases, demonstrates

that their agreement was not specific and complete in this respect and that the minds of the parties had never met on this subject. If the agreement sought to be specifically enforced is uncertain or incomplete a decree will not be entered to enforce the same. The terms must be fully stated and appear from the contract. (Dreishe vs. Eisendrath, 214 Ill., 199).

There appears to be another good reason why this agreement should not be enforced. About July 15, 1911, when appellee took possession of these premises and appellant presented him with the lease he refused to sign and accept the same. Appellant at the time appellee took possession was called upon to make an election as to what appellee's possession of those premises would be, if he did not sign lease. She did make an election by recognizing him as her tenant and accepting the sum of \$65.00 per month as rent and permitting him to remain in possession. When appellant did this appellee was not a tenant under the agreement to lease but was a tenant from month to month and it was not in December, 1913, within the power of appellant to change this relationship to one of leasehold without the consent of appellee. She had waived her rights under the agreement in question.

The decree was in accordance with the law and the facts and will be affirmed.

Affirmed.

(Not to be reported in full.)

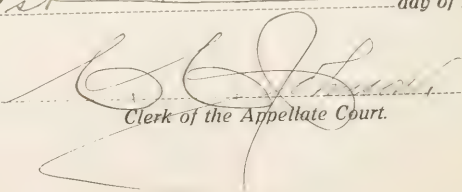
that such a statement was not specific and complete in this respect and that the minds of the parties had never met on this subject. If the agreement sought to be specifically enforced is a contract or agreement, a decree will not be entered to enforce the same. The terms must be fully stated and certain from the outset. (Harris v. Harris, 111 Cal. 150.)

There appears to be another good reason why this agreement should not be enforced. About July 10, 1911, when appellee took possession of these premises and appellant protested him with the lease, he refused to sign and accept the same. Appellant at the time appellee took possession was called upon to make an election as to what appellee's possession of those premises would be, if he did not sign lease. She did make an election by recognizing him as her tenant and accepting the sum of \$25.00 per month as rent and permitting him to remain in possession. When appellant did this appellee was not a tenant under the agreement to lease but was a tenant from month to month and it was not in December, 1911, within the power of appellant to change this relationship to one of lessor and tenant without the consent of appellee. She had waived her rights under the agreement in question. The decree was in accordance with the law and the facts and will be affirmed.

(Not to be reported in full.)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

194 I.A. 118

737

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 118

ERROR TO
APPEAL FROM

Trainor

vs.

No. 75-

October Term, 1914.

Circuit

COURT

Mason

COUNTY

Chicago Lumber Co. Inc.

TRIAL JUDGE

HON. *Albert M. Rose*

Term No. 75.

Agenda No. 62.

October Term, A. D. 1914.

Lee S. Trainor,	}	
Appellee,		
vs.		Appeal from
Chicago Sandoval Coal Comp-		Circuit Court of
any,		Marion County.
Appellant.	}	

Opinion by Harris, J.

Appellee filed in Circuit Court his declaration consisting of three counts in assumpsit.

The first count alleged that on, to wit: February 1, 1913, appellant promised to pay appellee so much money as he therefore reasonably deserved when requested but refused so to do and has not paid the same to the damage of appellee of \$800.00.

The second count at on, to wit: the 1st day of December, 1912, the appellant was desirous of having its two mines in and near the Village of Sandoval, Illinois, surveyed and the rooms and entries thereon shown, and appellant was then and there a civil engineer and had experience in surveying coal mines and, in consideration of the promises, that appellee, at the request of appellant, would purchase the necessary material and would employ the necessary civil engineers, chief of party and instrument man, chain men and helpers, and would superintend and oversee the surveying of said coal mines, the said appellant undertook and promised to pay appellee as compensation for said service, material, and furnishing the

October Term, A. D. 1911.

Appeal from
Circuit Court of
Marion County.

Appellee,

vs.

Chicago Sandover Coal Comp-

pany.

Opinion by Harris, J.

Appellee filed in Circuit Court his petition

consisting of three counts in substance:

The first count alleged that on, to wit: February 1, 1913, appellant promised to pay appellee so much money as he theretore reasonably deserved when requested but refused so to do and has not paid the same to the damage of appellee of \$800.00.

The second count set out, to wit: the 1st day of

December, 1913, the appellant was ordered to deliver for the mines in and near the Village of Sandover, Illinois, survey- ed and the rooms and entries thereon shown, and appellee was then and there a civil engineer and had experience in survey- ing coal mines and in consideration of the promise that ap- pellee at the request of appellant would purchase the neces- sary material and would employ the necessary civil engineers, chief of party and instrument men, chain men and helpers, and would superintend and oversee the surveying of said coal mines, the said appellant undertook and promised to pay appellee as compensation for said services, material, and furnishing the

necessary chief and instrument man, chain men and helpers, the cost of the material and one dollar per hour for ~~skiff~~ chief of party and instrument man and fifty cents per hour for chain men and helpers used and employed in and about surveying said coal mine.

There was a further
Allegation, ^{that} appellee, on ~~to wit~~, the 15th day of December, 1912, and divers days thereafter did furnish material, men and service in accordance with said agreement amounting in the aggregate to \$800.00 and thereafter on the 15th day of January, 1913, appellant paid appellee the sum of \$100.00 to be applied on said account and appellant, although requested on the 1st day of February, 1913, refused to pay appellee said amount or any part thereof and still neglects and refuses so to do.

The third count was the consolidated common counts. A copy of account sued upon was filed with declaration. The plea of general issue was filed to this declaration.

Upon the trial the evidence offered by appellee and admitted was under the second count of the declaration.

The contract as testified to by appellee ^{is} that in answer to a telephone call from Mr. Butterly, the superintendent of the mine, he, appellee, went to Sandoval on the 29th day of November, 1912, met Butterly at the mine and talked about the work. " He said they wanted a complete survey of the workings and, of course, the necessary top. He asked me what I could do the job for; I told him it would cost him \$1.00 per hour for the chief of party, man in charge of the work, and I asked him if he desired me to furnish the helpers and he said he preferred I should furnish them and nothing was said relative to price for the helpers. The company was to

necessarily chief and instrument man, chain men and helpers, the
 cost of the material and one dollar per hour for chain chief
 of party and instrument man and fifty cents per hour for chain
 men and helpers used and employed in and about surveying said
 cost nine.
 Declaration, Appellee, on to wit: the 15th day of
 December, 1912, and divers days thereafter did furnish mater-
 ial, men and service in accordance with said agreement amount-
 ing in the aggregate to \$800.00 and thereafter on the 15th
 day of January, 1913, appellant paid appellee the sum of \$100.00
 to be applied on said account and appellant, although request-
 ed on the 1st day of February, 1913, refused to pay appellee
 said amount or any part thereof and still neglects and refuse
 as so to do.
 The trial court was the consolidated action number.
 A copy of account sued upon was filed with declaration. The
 plea of general issue was filed to this declaration.
 Upon the trial the evidence offered by appellee and
 admitted was under the second count of the declaration.
 The contract as testified to by appellee is that in
 answer to a telephone call from Mr. Eubank, the undersigned
 one of the undersigned, went to Eubank on the 15th
 day of November, 1912, and Eubank at that time and asked
 about the work. He said they wanted a complete survey of the
 workings and of course, the necessary tools. He said he would
 I could do the job for; I told him it would cost him \$1.00
 per hour for the chief of party, man in charge of the work,
 and I asked him if he desired me to furnish the helpers and
 he said he preferred I should furnish them and nothing was
 said relative to price for the helpers. The company was to

furnish plugs and tools to drill the holes. They furnished plugs a part of the time and I furnished them a part of the time. The mine company was to pay for helpers. I was to bill against them every two weeks. The first two weeks ended on January 1, 1913, and on the 15th of January I got \$100.00 about one-half of what I asked for. The Company was to pay the necessary expenses of myself and men on top. I believe that is all the contract.

From the exhibits introduced in evidence by appellee he received his instructions as to the work in writing, and, among other things, he was to make a map showing all working places and those adjacent with entries leading to same, ~~surveys~~ all entries that ^{were} ~~are~~ working and those that ^{had} ~~have~~ been stopped, and all rooms that ^{were} ~~are~~ working and those that ^{had} ~~have~~ been stopped lately, ^{and} make a map in scale of 100 feet to inch. like the sample enclosed which was a blue print of an old plat.

It is evident from appellee's statement of what this oral contract was that appellant employed him as a civil engineer, to do something more than make measurements and drive plugs. That the object was to have reproduced in plat the underground workings of its mines. That appellee's entering upon the performance of the contract was a guarantee upon his part of the competency of those employed by him to perform their work so as to bring about this result in a reasonable time under the circumstances.

There ^{was} ~~is~~ no evidence that appellant ever accepted or used any part of this work or that any part of it was tendered to it in the form of plats or notes so that it might be used.

Appellee relied and ^{sought} ~~asked~~ to recover upon the theory

luncheon given and took to drill the holes. They furnished a part of the time and I furnished them a part of the time. The mine company was to pay for helpers. I was to drill against them every two weeks. The first two weeks ended on January 1, 1913, and on the 15th of January I got \$100.00 about one-half of what I asked for. The Company was to pay the necessary expenses of myself and men on loc. I believe that is all the contract.

From the exhibits introduced in evidence by appellee he received his instructions as to the work in mining and among other things he was to make a map showing all working places and those adjacent with entries leading to same. Every all entries that are working and those that have been stopped and all rooms that are working and those that have been stopped lately. Make a map in scale of 100 feet to inch. Like the sample enclosed which was a blue print of an old plat. It is evident from appellee's statement of what this oral contract was that appellant employed him as a civil engineer, to do something more than the measurements and drive plugs. That the object was to have reproduced in plat the underground workings of the mine. That appellee's testimony upon the performance of the contract was a guarantee upon his part of the competency of those employed by him to perform their work so as to bring about this result in a reasonable time under the circumstances.

There is no evidence that appellant ever accepted or used any part of this work or that any part of it was tendered to it in the form of plats or notes so that it might be

Appellee relied and acted to recover upon the theory

of the law that because he was stopped by appellant without cause he ^{was} ~~is~~ entitled to a verdict for the contract price. The contract as contended for by appellee is not in writing, except the instructions offered in evidence by appellee. This contract is not severable, because while payments were provided for on account there were no stipulated times for acceptance of work and payment therefor. The case of Dobbins vs. Higgins, 78 Ill., 440, and the case of Keeler vs. Clifford, 165 Ill., 544, are not applicable to the case at bar. The contract in this case is not substantially performed, only partly performed, and the part performed has not been accepted or appropriated by appellant, nor is there any evidence tending to show appellant has had the opportunity to appropriate any part of it. This being true the suit not being upon the contract for work done in conformity with its terms and accepted by appellant, the recovery could only be for the value of the services rendered by the appellee, without reference to the contract. (Wilson vs. Bauman, 80 Ill., 493).

If there could be no recovery under this contract pro tanto it follows that there being no evidence in support of a quantum meruit all the errors argued as to the admission of evidence and giving and refusing instructions by appellant should be sustained and the judgment reversed and cause remanded.

Reversed and remanded.

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(Not to be reported in full.)

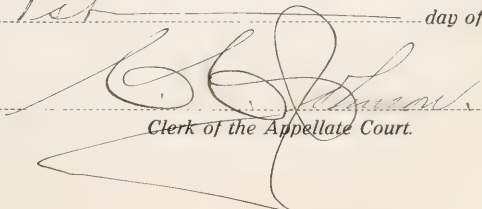
of the fact that because he was stopped by appellant without cause he is entitled to a verdict for the contract price. The contract is not as contended for by appellee is not in writing, except the instructions offered in evidence by appellee. This contract is not as contended for by appellee, because this contract was not made for on account there were no stipulated times for no- compliance of work and payment therefor. The case of Dobbins vs. Higgins, 78 Ill., 440, and the case of Keeler vs. Gillford, 185 Ill., 544, are not applicable to the case at bar. The contract in this case is not substantially performed, only partly performed, and the part performed has not been accepted or approved by appellant, but is part of the contract. It is not to show appellant has had the opportunity to re-ovise any part of it. This being true the suit not being upon the contract for work done in conformity with its terms and accepted by appellant, the recovery could only be for the value of the services rendered by the appellee, without reference to the contract. (Wilson vs. Bowman, 80 Ill., 483.) If there could be no recovery under this contract it would follow that there being no evidence in support of a quantum meruit all the errors argued as to the admission of evidence and giving and refusing instructions by appellant should be sustained and the judgment reversed and cause remanded.

Reversed and remanded.

(Not to be reported in full.)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

740

94 A 144

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

✓ Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 144

ERROR TO
APPEAL FROM

vs.

No. 2

October Term, 1914.

Bisquit COURT

St Louis COUNTY

TRIAL JUDGE

HON. Mrs. H. E. Green

Term No. 2.

Agenda No. 17.

October Term, 1914.

Florence Bowler Cash,

Defendant in Error,

vs.

Elgin T. Cash,

Plaintiff in Error.)

Error to St. Clair.

Opinion by Higbee, J.

Action by
~~Defendant in Error~~ brought suit against her husband, the plaintiff in error, for separate maintenance, and the court entered a decree ~~saying~~ *that* she was entitled to the relief prayed for and ordering her husband to pay ~~75.00~~ for solicitors' fees, which amount was immediately paid and also to pay her ~~120.00~~ ⁷⁵ a month for alimony, and a further sum of \$50.00 for an additional solicitors' fee. It was likewise decreed that she have possession of the household goods and furniture located in the former home of the parties in East St. Louis, Illinois, without interference from the husband, until the further order of the court. An appeal having been taken from this decree by her husband she afterwards filed a petition for an order for sufficient money to pay her solicitors' fees and other expenses in prosecuting her suit on appeal, and the court allowed her \$100.00 solicitors' fees and \$120.00 a month for alimony during the pendency of the appeal. This order was also appealed from and she filed another petition asking additional amounts and she was allowed still another \$100.00 for solicitors fees and a \$100.00 a month until the determination of that appeal. All

Exhibit (A)

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of said amounts, except \$100.00 solicitors fees, were ordered to be credited on the amount allowed in the original decree. The last decree was also appealed from and the three cases were thereafter consolidated in this court and tried as one case, which is reported in 180 Ill. App. 31, to which reference is made for a fuller and more complete statement of the facts upon which the several decrees were based.

This court on the appeal as shown by its opinion, found that appellant was not asking to exceed \$150.00 a month and that the sum of \$120.00 a month allowed for alimony was excessive. It was also therein stated that the facts as shown by the record would not justify an amount exceeding \$50.00 to \$75.00 per month, and that solicitors fees were allowed without any evidence tending to show the reasonable value of the services. It was held that the trial court was fully warranted in decreeing that appellant was living separate from appellee without her fault and the decree was affirmed, except as to that portion allowing the alimony and solicitors fees and as to those matters, the decree was reversed and the cause remanded in order that further evidence concerning them might be heard. The case was afterwards reocketed in the circuit court and additional evidence heard concerning plaintiff the amount of ~~defendant~~ in error's income and property also in relation to the amount of the reasonable solicitors fee and necessary expenses connected with the suit, which should be allowed. After hearing the proofs the court entered a decree ordering plaintiff in error to pay defendant in error \$100.00 for her support and maintenance from July, 1912, to June 30, 1913; that he pay her thereafter for her support and maintenance the sum of \$75.00 on the first day of each calendar month until the further order of the court, beginning

of said amount, amounting to \$100.00, which said amount
is to be credited to the account of said plaintiff.
The said amount was also applied towards the payment of the
general tax levied in said county and paid to the
which is interest in the said tax, to which reference is
made for further and more complete statement of the facts
upon which the several decrees were based.
This court on the report of the referee in the
found that plaintiff was not owing to the said \$100.00, and
and that the sum of \$100.00 was not allowed for alimony and
expenses. It was also found that the said \$100.00 was
of the report made by the referee in the said case, and
of \$75.00 per month, and that plaintiff was not entitled to
plaintiff any evidence tending to show the amount of the
the referee. It was also found that the said amount was
retained in payment of the said tax, and that the amount
from plaintiff without her fault and the amount was allowed
except as to that portion of the said tax which was paid
the fact and as to those matters, the referee was correct and
the cause remained in order and further evidence was not
was right to hear. The case was then remanded to the
the circuit court and additional evidence taken concerning
the amount of plaintiff's income and expenses and
in relation to the amount of the tax which plaintiff was
and necessary expenses connected with the said tax, and
be allowed. After hearing the proof the court ordered
three-yearly plaintiff in order to pay the said tax of
\$100.00 for her support and alimony for the year ending
June 30, 1913; that she pay her share of the said tax and
maintenance the sum of \$75.00 on the first day of each
month which said tax shall be paid by the court.

with July 1, 1913; also that he pay to her for her solicitors fees and expenses of suit, the sum of \$350.00, with the additional provision that if the decree was appealed from or writ of error sued out upon the same, that he pay her the sum of \$100.00 for solicitors fees in the appellate court. In addition to the money payments provided for, it was also decreed that defendant in error should have and hold as her own, *Certain household furniture and* the personal property, now held by her, the possession of which *from which decree the husband prosecuted a writ of error.* *was given her by the former decree.* *and within the court on appeal (see that appeal)* The case is again brought to this court by the defendant below, this time by writ of error, the complaint being that the several accounts allowed defendant in error as ~~above stated, are excessive and that the court erred in giving her the absolute ownership of the household goods and furniture.~~ Then the case was here before this court and in discussing the amount of alimony allowed the wife, which under ~~that decree was \$125.00 per month,~~ "The facts as shown here would not justify alimony exceeding \$50.00 to \$75.00 per month." On the last hearing the trial court fixed the amount of alimony to be paid subsequent to the decree at \$75.00 a month, which was within the limit formerly suggested by this court and defendant in error claims that it is justified thereby as well as by the proofs. On the other hand plaintiff in error contends that the additional evidence introduced at the last trial, showed that the amount allowed defendant in error for said purpose should have been much less. His testimony and his books of account introduced by him, tend to show that for seventeen months prior to the hearing his average net income from his business, had been \$66.09 a month. If this were

~~all the income he had it was evident that the allowance made to the wife of \$75.00 a month would be too much, notwithstanding the fact that he was possessed of other property to the amount of several thousand dollars.~~ *The evidence showed that* Plaintiff in error was engaged in the commission business, buying and selling live stock, *that* in East St. Louis. In 1911 and 1912 his books showed that he sold hogs of the value of three millions of dollars for each year, and for the five months of 1913 preceding the trial, the amount of credits received by him aggregated more than two million of dollars; that during the five months previous to the last trial he bought and sold more than one hundred thousand hogs. At the time of the second trial he was paying to one of his office employees, who was his uncle, \$150.00 a month, to another employe \$90.00 a month and two others \$75.00 a month. His rent was \$20.00 a month and his telegraph and telephone bills something like \$200.00 a month. In addition to this there was evidence of personal expenses to a considerable amount incurred by him. It also appeared that he was the owner of real estate valued at several thousand dollars and owned an automobile valued at some \$3,000.00. As to the standard of living to which his wife had been accustomed, it appeared that it had cost plaintiff in error about \$150.00 a month when they were living together to keep up the house. ~~The volume of business done by plaintiff in error as well as these other matters, were no doubt considered by the trial judge, acting as chancellor in determining the proper amounts to be charged against plaintiff in error for the purposes named. Three trial judges have heard the evidence relating to these subjects and upon consideration of the same the first allowed the wife \$120.00 a month for ali-~~

all the money he had at his disposal for the purpose of
to the wife of \$100.00 a month for the purpose of
the fact that he was a member of the same organization
amount of money - amount of money. He was in error as
working in the fashion business, buying and selling live
stock in the same way. In 1911 and 1912 his books showed
that he sold pigs of the value of three millions of dollars
for each year and for the five months of 1913 respectively the
total amount of credits received by him aggregated more
than two million of dollars; that during the five months
previous to the last trial he bought and sold more than one
hundred thousand pigs. At the time of the second trial he
was paying to one of his office employees, who was his wife,
\$150.00 a month, to another employee \$75.00 a month and to
others \$75.00 a month. His bank was \$100.00 a month and his
retainer was \$100.00 a month. In addition to this there was evidence of personal expenses
to a considerable amount incurred by him. It was also shown
that he was the owner of real estate valued at several hundred
thousand dollars and owned a considerable amount of stock in various
companies. As to the standard of living to which he had been ac-
customed, it appeared that it had cost him \$100.00 a month
about \$150.00 a month when they were living together at that
up the house. The volume of evidence about his financial
affairs was so great that it was impossible to present a complete
picture of his life, but it was sufficient to show that he was
a man of great wealth and that he was living in a manner
entirely inconsistent with the charges against him.

mony, the second allowed \$100.00 a month and the last having heard additional evidence, allowed \$75.00 a month.

While in view of the additional evidence, which was introduced at the last hearing and considered by the court in connection with the proofs of the first trial, it would appear that the amount of \$75.00 allowed the wife for alimony was full large, yet under all the conditions and circumstances shown by the proofs, we cannot say that said amount was so excessive as to show an abuse of discretion on the part of the chancellor in allowing the same, and we are the more inclined to this holding from the fact that should financial or other changes take place, effecting the condition of the parties hereafter, a petition may readily be presented to the court for a reduction of the amount of alimony allowed and upon a proper showing made, an order will follow giving the requisite relief. We are further of opinion that taking into consideration the conditions above mentioned as disclosed upon the two trials, the allowance of \$400.00 to complainant for her maintenance from July 12, 1912, to June 30, 1913, which was ^{about} the amount of \$50.00 a month, was not in any degree excessive.

Plaintiff in error is especially insistent that the allowance of \$350.00 for solicitors fees with the further provision for the payment of \$100.00 for the same purpose, should the case be appealed or writ of error sued out, is excessive, especially when it is taken into consideration that plaintiff in error had actually paid the further sum of \$75.00 for the same purpose before the first trial. In reference to the last item, it may be said that the testimony of attorney for defendant in error shows that before the case was tried the

last time, there had been expended in actual and necessary expenses connected with the case, exclusive of attorney's fees, \$24.35 more than the \$75.00 which plaintiff in error had paid under order of the court for solicitors fees. The services rendered to defendant in error by her solicitors extended over a period of more than two and a half years and the various trials had together with the two appeals and the consultations necessary in connection therewith and the work of preparing for trial, must have required a great deal of time and attention. It was agreed upon the trial that \$100.00 would be a reasonable fee for taking the case to the appellate court. Two witnesses, practicing lawyers of experience and ability of the bar of St. Clair county, testified that a reasonable and customary fee for the services rendered to defendant in error by her solicitors, would be \$600.00. In view of this proof and from the facts disclosed by the record, we think that plaintiff in error has failed to sustain his claim that the amount allowed for solicitors fees was in any degree excessive.

The remaining question to be considered relates to that part of the decree which gave to defendant in error absolute ownership of the household furniture mentioned in the former decree. In the case of Raab v. Raab 120 Ill.App.554, it was held, that in a proceeding for separate maintenance, the chancellor had no authority to decree a sum in gross as an allowance to the wife. In Hunter v. Hunter 121 Ill.App. 380, it is said upon the same subject, "While in cases of absolute divorce, alimony is occasionally decreed to be paid in gross, such order is invariably made upon condition that it

[illegible]

is to be in full satisfaction of all future claims for support. "Where the bonds of matrimony are perpetually severed and the parties are henceforth as utter strangers or where special reasons exist therefor, it may be desirable and proper that such order be made. The practice however should not pertain in suits for separate maintenance." The theory upon which the above opinions were based, is that notwithstanding the decree of separation between husband and wife, the marital relations between them still exist, the effect of the decree being to permit the wife to live separate and apart from her husband without forfeiting her right to be supported by him; that it might be necessary from time to time by reason of changed conditions, to modify the order providing for alimony by increasing, diminishing or even dispensing altogether with the amount ordered to be paid; that if at any time subsequent to the decree, the wife desired to return to the husband, she could do so and demand support from him notwithstanding the extent in amount of the sum he may have paid here for alimony. It appears to us that the giving to the wife of the full ownership of the furniture in question amounted to the allowance of alimony in gross to her to that extent and that such allowance should not have been made. We are, however, further of opinion that this matter was fully covered by the former proceedings in this case. The first decree gave the wife the right of possession only of said furniture and household belongings and while special mention was not made of that feature of the decree in the opinion filed in this court upon appeal, yet it plainly appears from that opinion that such portion of the decree was affirmed, and

is to be in full satisfaction of all debts and liabilities
owed. There is no doubt that the husband is entitled to
and can make the property as after death as on death
special reasons exist therefor, it may be desirable and proper
to give such order as shall be just. The husband is entitled to
certain in order to make his property available. The order was
which the court ordered was made, it was not intended
the duties of administration may be imposed on the wife.
the relations between them with regard to the estate of the husband
one reason to make the wife in like capacity and with the
her husband without making her liable to an extent to
him, that it might be necessary from time to time by reason
of changed conditions, to modify the order provided for at
least by increasing, diminishing or even dispensing with
together with the amount ordered to be paid; that it is at
times subsequent to the decree, the wife desired to remain to
the husband, she could do so and demand support from him con-
withstanding the extent in amount of the sum he may have
paid here for alimony. It appears to me that the wife is
the wife of the full ownership of the husband is question
amounted to the allowance of alimony in gross to her so that
extent and that such allowance should not have been made. We
are, however, further of opinion that this matter was fully
covered by the former proceedings in this case. The first
decree gave the wife the right of possession for life of all
furniture and household belongings and this special provision
was not made of that nature of the decree in the opinion
filed in this court upon appeal, yet it clearly appears from
these records that such portion of the husband's estate

the case was remanded for further proceedings effecting other portions only thereof. We do not think however, it is necessary to reverse this decree and remand the cause in order that the same may be corrected in the particular mentioned, but that the correction may be made here. Accordingly the decree of the court below is modified by striking out that portion of it which gives to defendant in error the absolute ownership of the household furniture mentioned therein and as so modified, such decree is affirmed.

Decree affirmed. *

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(Not to be reported in full.)

the case was decided by further proceedings affecting other
portions only thereof. To do that, however, is to
necessitate to reverse this decision and remand the cause in order
that the same may be corrected in the particular mentioned.
But that the correction may be made here. Accordingly the
verdict of the court below is modified by striking out that
portion of it which gives to defendant in error the absolute
ownership of the household furniture and effects, leaving
as so modified, such decree is affirmed.

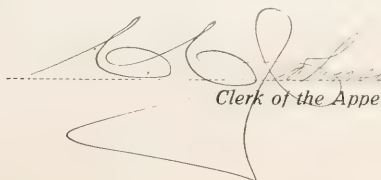
George Williams

Attorney General

(Not to be reported in full)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

741

4 A 146

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

✓ Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 146

H. L. Iron Mountain
and So. Ry. Co.

ERROR TO
APPEAL FROM

vs.

No. 10

October Term, 1914.

City COURT

East St. Louis COUNTY

A. H. Hall Construction Co.

TRIAL JUDGE

HON. W. M. Vandeventer

Term No. 10.

Agenda No. 3.

October Term, 1914.

St. Louis, Iron Mountain and
Southern Railway Company,

Appellant,

vs.

H. H. Hall Construction Company,
Appellee.

Appeal from City
Court of
East St. Louis.

Opinion by Higbee, J.

This suit was instituted before justice of the peace by appellant, to recover from appellee \$117.95 for freight and advanced charges on a car load of cast iron pipe, claimed by appellant to have been shipped from Chattanooga, Tennessee, on August 24, 1912, and delivered to appellee on September 4, 1912, on appellant's track at Herrin, Illinois, where appellee was engaged in installing a city water plant. In the city court of East St. Louis, where the case was taken on appeal from the ~~xxxx~~ justice of the peace, the jury found the issue for appellee and judgment was entered against appellant for costs, ~~the latter~~ ^{therein} ~~costs~~. From that judgment an appeal has been taken to this court, it being insisted by appellant that the same should be reversed for the reason that it was not sustained by the proofs and that the court erred in its rulings in regard to the evidence and instructions.

It appeared from the proofs that appellant has two freight stations at Herrin, one of which is located in the outskirts of the city on appellant's main line and the other a sub, or city station, known as the Herrin station, located near the business center of the city. The two stations are

some three quarters of a mile apart and cars for the city station are taken from the main station to that place by electric motors. At the city station appellee had erected a derrick at a track known as house track No. 1 for the purpose of unloading the cars of pipe which were being received for use in connection with the water system. ^{Not} During the summer and fall of 1912 some thirty or forty car loads of material were delivered on this sidetrack by appellant and unloaded by appellee, at the derrick.

The only question presented as to the facts on this appeal is ^a whether the car in question which was marked I.C. No. 118461, was delivered to appellee on said sidetrack. While there is some discussion in the briefs as to what constitutes a delivery, yet it is in effect conceded by both parties that if the car in question was placed upon said sidetrack as other cars were which were loaded with material for appellee to be used in constructing said water system, then there was a delivery of the car to appellee so far as the purposes of this suit are concerned. If the car ^{was} delivered to appellee then appellee was liable for the amount of freight and other charges claimed by appellant. The case was apparently tried below solely upon this question, appellant's witnesses testifying it was so placed on said track while those for appellee testified that it was not.

Appellant introduced witnesses who testified that the car in question was "spotted" on the house track at appellee's derrick on September 4, 1912, and appellee's superintendent notified that this particular car was there. On the contrary appellee produced witnesses who testified that

it was never placed upon said track nor received by it. Appellee's superintendent in charge of its work stated that he received a bill of lading for the car in question about the latter part of August and was on the lookout for the car but that he did not get it, and he denied that he was ever notified that this particular car had been received. He also stated that while some 30 M to 40 cars of pipe were received by appellee, that the notice given it was always in general terms. The president of appellee, Mr. Hall, testified that he received the bill of lading about September 1, 1912, and that he made inquiry from time to time of appellant's agent at Herrin regarding the car and was informed that it had not yet come. A letter was also introduced in evidence over appellant's objection, addressed to Mr. Hall dated January 10, 1913, and signed by E. M. Swisher appellant's agent at Herrin saying, "referring to yours 9th day to advise we have not as yet rec'd. M. & O. 118461 car and 6 in. pipe yet." Appellant's objection to this letter was that it referred to M. & O. car while the car in dispute was an I. C. car the number being the same. Appellant's agent Swisher however testified that there was but one car in dispute and that was I. C. 118461 and that was the car he was referring to in this letter, which was in answer to a letter of inquiry written by the president of appellee, and the letter was therefore properly admitted in evidence.

It also appeared from the proofs that the expense bill for the car was not rendered appellee until September 30, 1912, and that it was customary to render the same at the time of the delivery of the car. In order to recover for the freight and other charges upon the car, the burden was upon appellant to show by a preponderance of the evidence

[illegible]

~~In the case that the car was delivered to appellee, that is that it was placed upon the track where cars were usually delivered to appellee.~~

The proof upon this question was conflicting and from it we are unable to say that the verdict of the jury was manifestly against the weight of the evidence. Under such circumstances it is unnecessary to cite authorities to sustain the position that the verdict of the jury should not be disturbed.

The principal objection to the rulings of the court in regard to the evidence was by reason of the admission of the letter of Mr. Swisher, the agent of appellant to Mr. Hall, above referred to and which we have already disposed of. Another objection in regard to the evidence was the admission of a statement of Mr. Hall in response to a question of counsel for appellee as to his knowledge concerning the car referred to. The question referred to was, "Do you know anything particular about this car in dispute out of the ordinary"; and the answer, "We did not receive the shipment of pipe." The answer was not responsive to the question and might well have been stricken out upon the motion of appellant but it could have done no harm, as the matter of Mr. Hall's knowledge concerning the car and the shipment of pipe were both fully gone into and disclosed later on in Mr. Hall's testimony. ✓

Criticism is further made of the action of the trial court in admitting an expense bill rendered by appellant to appellee for the freight and advance charges claimed. The record does not show any objection of appellant to the introduction of this bill at the time it was read in evidence,

In the case that the copy was delivered to the witness, there is

that it was placed upon the bench where it was

delivered to the witness.

The point upon this question was that the witness

from it is not possible to say that the witness is the jury

was manifestly against the weight of the evidence. Under

such circumstances it is unnecessary to also authorize to

to sustain the position that the witness of the jury should

not be directed.

The principal objection to the ruling of the

court in regard to the evidence was on account of the admis-

sion of the letter of Mr. Graham, the agent of the plaintiff

to Mr. Hall, which letter was read to the jury.

disposed of. Another objection is made to the evidence

was the admission of a statement of Mr. Hall in response

to a question of counsel for appellee as to his knowledge

concerning the oil pipeline for the pipeline existing in

was, "Do you know anything particular about this case in this

pute out of the ordinary," and the answer, "We did not

ceive the shipment of pipe." The answer was not responsive

to the question and might well have been answered as upon

the notion of appellant but it would have done so because

the master of Mr. Hall's knowledge concerning the case and

the shipment of pipe were both fully gone into and discussed

later on in Mr. Hall's testimony.

Objection is further made of the case of the

trial court in admitting in evidence Hall's testimony by appel-

lant to appellee for the freight and advance charges on the

The record does not show any objection of appellee to the

introduction of this bill as the bill is not in evidence.

but if there had been such objection we see no good reason why the bill was not properly admitted, as it clearly showed what appellant was claiming in the suit.

~~Complaint is made of Appellee's instruction No. 1~~
~~which told the jury, that appellant had sued for freight~~
~~charges on a car of pipe, which it claimed was delivered to~~
~~appellee, and that it was incumbent upon appellant to prove~~
~~by a preponderance or greater weight of the evidence that~~
~~the car of pipe was delivered to appellee before it could~~
~~recover. The criticism of this instruction is that it ap-~~
~~pears to require an actual delivery of the car to appellee,~~
~~when it is claimed by appellant that it was only necessary~~
~~for it to place or spot the car on the sidetrack at the us-~~
~~ual place where appellee received its pipe for use upon its~~
~~contract. Even if it should be conceded that the instruc-~~
~~tion was not technically correct yet it could not have mis-~~
~~led the jury or injured appellant for the reason that sev-~~
~~eral~~^{other} ~~instructions given by appellant told the jury that it~~
~~was sufficient to entitle appellant to recover, if it placed~~
~~the car on its delivery track at the usual and custom-ary~~
~~place for the delivery of such cars of pipe to appellee and~~
~~had not received payment for transportation thereof, and it~~
~~was upon this theory that the case was tried. Upon the whole~~
~~we find no sufficient reason in this record for a reversal~~
~~of the judgment of the court below and the same is there-~~
~~fore affirmed.~~

Judgment affirmed.

(Not to be reported in full.)

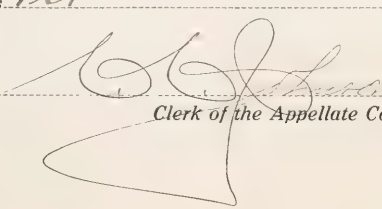
but if there had been such objection we see no good reason why the bill was not properly admitted, as it clearly showed what appellant was claiming in the suit.

Complaint is made of appellee's instruction No. 1

which reads: "The jury shall determine whether the car was delivered to appellant on a day of pipe, which is claimed and delivered to appellant, and that it was announced upon appellant to have by a preponderance of greater weight of the evidence that the car of pipe was delivered to appellee before it was recovered. The evidence of this instruction is that it is a matter of fact whether delivery of the car to appellant was made or not; and if it was made, it was made for it to give or take the car on the sidewalk of the use and place where appellee received the car, and was made the contract. Now it is shown to be conceded that the instruction was not substantially correct, yet it could not have been for the jury to reject the instruction for the reason that it was a question given by appellant to the jury that it was sufficient to entitle appellee to recovery, it is not a question on its delivery track at the usual and ordinary place for the delivery of such cars of pipe to appellant, and had not received payment for transportation thereof, and it was the duty of the jury to find that the car was delivered to appellant on the day of pipe, and the bill is correct."

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

94 A 149

742

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

✓ Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 149

Page

ERROR TO
APPEAL FROM

vs.

No.

14

October Term, 1914.

Circuit COURT

Franklin COUNTY

Wright

TRIAL JUDGE

HON.

Thomas M. Jett

October Term, A. D. 1914.

Anna E. Page,

Defendant in Error,

vs.

Error to Fayette.

C. E. Wright,

Plaintiff in Error.

Opinion by Higbee, J.

~~The facts from which this suit arises are shown on the trial to be as follows: On January 3, 1913, Anna E. Page, defendant in error, was the owner and in possession of a livery stock in Ramsey, Illinois, consisting of horses, vehicles, harness and an automobile, ^{and} together with a gasoline engine and lighting outfit and some other articles located in the stable where they were being used in the livery business. On that date she sold the same to C. E. Wilson for \$2,000.00, ^{he giving} ~~he giving~~ her therefor a one-half interest in two buildings and a pair of scales on a leased lot in Ramsey, used in the livery business and executing to her his note for \$1025.00 ^{in full payment} due April 1, 1913, with interest at the rate of seven per cent per annum from date, and secured said note by a chattel mortgage on the livery outfit. On March 29, 1913, Wilson took possession up this note by executing a new judgment note to Mrs. Page for \$1045.65 due ninety days after date, with interest at the rate of seven per cent per annum, and also secured said note by chattel mortgage on said livery stock with which mortgage was duly acknowledged and recorded on April 5, 1913. On April 2, 1913, C. E. Cruse, a brother-in-law of Wilson, signed a note with him as his surety for \$250.00, payable to the Ramsey Bank and Wilson gave him a second mort-~~

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1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 26

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Page 10 of 10

we have observed the following: (a) *Chlamydomonas reinhardtii* is

... ..

U.S. DEPARTMENT OF JUSTICE

[illegible]

10. The following table shows the number of people who attended the concert in each age group.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

DOI: 10.1002/for

... and the ... of ...

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

gage on said livery stock for \$600.00 to protect his as sure-
ty . When the renewal mortgage matured, there being then due
and unpaid upon it the sum of \$1080.00, the mortgagee, Mrs.
Page, through her husband, who acted as her agent, obtained a
bill of sale from Wilson for the property named in the mort-
gage, and an arrangement was made that Wilson should hold the
property for her use and keep account of the business done by
him. It was also arranged that Wilson might sell the property
if he could do so and if ~~anything~~ ^{anything} was left after paying Page's
indebtedness, he was to have it. Shortly afterwards, Wilson
secured W. R. Wright, the plaintiff in Error, to assist him
in trying to dispose of the stock and through this action
Wright appears to have become acquainted with the manner in
which Wilson was holding the stock, and on learning that the
bill of sale was not recorded informed Wilson that the lien
was invalid and offered to buy the property of him. The two
then went to Vandalia, where they examined the records and
~~found the Page and Cruse mortgages on record and unreleased~~
~~but no bill of sale of the property from Wilson to Mrs. Page~~
~~of record.~~ Cruse was then sent for and with Wilson's con-
sent, turned over the \$600.00 mortgage to Wright who then
xxx paid
xxx off Wilson's note to the bank for \$350.00, upon
which Cruse was Surety and certain other notes owed by Wil-
son, amounting in all to \$355.00, and thereupon Wilson gave
him possession of the mortgaged property. Afterwards Wright
sold the automobile for \$150.00 and the livery stock proper
to Lee and Gilbert, for \$1,000.00, leaving the gasoline en-
gine, lighting plant and oil tank valued at \$300.00 on hand.

Defendant in Error Page filed a bill in equity
setting up the facts substantially as above and stating that

[illegible]

said bill of sale of said goods and chattels, constituted only a security for the payment of her of the principal and interest due on the note she held against Wilson. She also charged in the bill that Wilson and other servants of hers took charge of said property and conducted the business until July 23, 1913, when Wilson and Wright, intending to cheat and defraud her out of her said property and the money due her, pretended that Wright did on that day buy from Wilson said goods and chattels, and in furtherance thereof Wilson delivered the property to Wright; that said sale to Wright was in gross of all the goods and chattels in the possession of Wilson and that said Wright did not demand or require of Wilson a statement in writing under oath, of all the creditors of Wilson, before consummating said pretended sale; nor did said Wright give any notice whatever to defendant in error or any other of Wilson's creditors of said contemplated sale and purchase, by reason whereof said sale, transfer and assignment was under the statute in such case made and provided fraudulent and void as to defendant in error and to all the creditors of said Wilson; that thereafter Wright made a pretended sale of the property to Lee and Gilbert who with Wright, were made parties defendant to the bill; that within two days after said fraudulent and pretended sale by Wilson to Wright and as soon as defendant learned thereof, she demanded of Wright that he deliver said goods and chattels to her, informing him of her rights and interests therein but that Wright refused to surrender said goods or any part thereof and ~~con-~~
This page continued that the sale from Wilson to
~~verted the same to his own use, and that in the transfer of~~
was not in accordance with
~~the order of Wright to Lee and Gilbert, the provisions of the~~
statute in regard to sales in bulk, ~~were not complied with.~~

Bill of sale of a certain lot of land situated in the County of ... State of ... to the said ... of the said ... County of ... State of ... for the sum of ... Dollars ...

Wright filed an answer denying most of the allegations of the bill and alleging that before he purchased the property he examined the mortgage records in the office of the circuit clerk and found no lien or encumbrance against the same except said mortgage to Cruse; also that at the time he bought the property, it was not worth to exceed \$800.00 and that Wilson had a right to an exemption of \$400.00 in said property against his creditors, which he purchased. Lee and Gilbert filed a separate answer stating that they in good faith and for a valuable consideration, bought the goods and chattels in question of Wright, who was at the time in possession of and exercising the right of ownership over the same and denying that defendant in error had any lien on the property. An amended answer was afterwards sought to be filed by Wright, Lee and Gilbert, which in addition to matters contained in their separate answers, sought to raise the question of the right of defendant in error to prosecute a suit in equity for the relief she desired to obtain.

Upon the hearing the court entered a decree finding that all the material allegations of defendant in error's bill were true as alleged therein and that on the 31st day of July, 1913, Wright, well knowing that Wilson was indebted to plaintiff in error, and knowing the existence of the chattel mortgage and bill of sale covering the same, but intending to defraud, delay and hinder defendant in error in the collection of her indebtedness, induced Wilson to deliver to him said property in bulk upon a promise that he, Wright, would pay off the indebtedness to a bank in which Wright was interested, amounting to \$773.00; that in pursuance thereof Wilson ^{did} transfer or attempt to transfer to Wright all of said stock in

"Right filed on for an action of debt and damages
allegations of the bill and alleged that before he purchased
the property he examined the mortgage records in the office
of the clerk and found no lien on the property and that
the same exact title mortgage as shown; also that at the time
he bought the property, it was not worth so much as stated
and that Wilson had a right to an exemption of \$1000.00 in said
property against his creditors, which he purchased for \$1000.00
Gilbert filed a counter claim against said property and
also for a valuable consideration, bought the same and
therein in question of "right" and was at the time in the
possession of and exercising the right of ownership over the
same and denying that defendant is owner of the same and
that the same was wrongfully taken from him by the
defendant, his wife, and children, and in violation of the
rights of said defendant, his wife, and children, and in
violation of the right of defendant in error to possession
and in equity for the value of the same as stated
Upon the hearing the court entered a verdict finding
that all the material allegations of defendant in error's bill
were true as alleged therein and that he was entitled to the
property, and that Wilson was indebted to him for the
same and that the existence of the property was
in error and that the same was wrongfully taken from him
and that he was entitled to the same and that the same was
indebted to him and that the same was wrongfully taken from
him and that the same was wrongfully taken from him and that
the same was wrongfully taken from him and that the same was
wrongfully taken from him and that the same was wrongfully
taken from him and that the same was wrongfully taken from him
for or against to himself or his heirs and assigns in

bulk, the same being of the value of more than \$1,300.00, without said Wright or Wilson or either of them in any way, complying whatever or attempting to comply with the provisions of the statute known as the Bulk Sales Law, or without in any way giving or attempting to give the notice required by said law to defendant in error or any other creditor of said Wilson; that the attempted sale or transfer was an actual fraud of the rights of complainant as a creditor of Wilson and her lien on said goods; that the equitable title to said goods was in defendant in error and that Wright held the same as trustee for her and her use; that Wright had sold the automobile for \$150.00 and the stock of goods to Lee and Gilbert for the sum of \$1,000.00; that complainant had not been paid any part of her claim of \$1060.00 and that Wilson had no other property except such as was ex capt. ^a The decree ~~dismissed the bill as to defendants Wilson, Lee and Gilbert, but directed that the plaintiff in error Wright pay to defendant in error Lee with- in ten days, the sum of \$1,060.00 with interest at the rate of five per cent per annum from the first day of October, 1913, and the costs of suit. It ^{was also stated in the decree that} ~~the amended answer were referred to, had been presented to the court in vacation after the cause had been taken under advisement and that leave to file the same was refused by the court.~~~~

Plaintiff in error claims that it was error on the part of the court below to enter a personal money judgment against him because if the defendant in error had any remedy at all in the premises, it was wholly and solely by reason of his lien upon the premises created by the statute; that the judgment was far too large a sum and was not sustained by the proofs; that the Bulk Sales Law of 1913 does not attempt to impose any personal liability upon the fraudulent vendee but

bulk, the same being of the value of \$100,000.00, and the same being
out said Wright or Wilson for either of them in any way, and
paying whatever or attempting to receive any for; and that
of the estate known as the Bulk Sales Act, or thereof in any
any giving or attempting to give the same to any person or
law to defendant in error or any other person or entity, and
and, that the attempted sale or transfer was in violation of the
of the rights of complainant as a creditor of Wilson and that
lien in said goods; that the complainant's claim to the goods was
in defendant in error and that Wright had no right to transfer
for her and her use; that Wright had sold the goods to the
\$100.00 and the stock of goods to her and Wright for the sum
of \$1,000.00; that complainant had not been paid any part of
her claim of \$100.00 and that Wright had no other property
except the goods in error. The estate of Wilson and Bulk
to defendant Wilson, her and Wright, and defendant Wright in
whenever in error Wright had the Bulk Sales Act, and that
in error, the sum of \$1,000.00 with interest at the rate of
five per cent per annum from the first day of January, 1911,
and the costs of suit. The estate of Wilson and Bulk Sales Act
for defendant Wilson and Wright, and defendant Wright, and the
costs of suit, and that the same be paid to the complainant
and that the same be paid to the complainant in full, and that
the Bulk Sales Act in error of defendant Wilson and Wright, and
that of the same Bulk Sales Act in error of defendant Wilson and
against him because of the Bulk Sales Act in error of defendant
at all in the premises, it being his duty and duty to pay to
his lien upon the goods in error of the estate of Wilson and
judgment on the two hundred and one hundred and one hundred and
pounds; that the Bulk Sales Act of 1911 does not apply to
cases and persons claiming under the Bulk Sales Act.

clearly declares the sales under such circumstances null and void as against creditors of the vendor. The proofs in the case plainly showed that Mrs. Page had formerly owned the property in question which she had sold to Wilson, who had gone into possession of the same; that she had never been paid the purchase price of the property by Wilson and that the note which he gave her for the debt he owed was secured by chattel mortgage which was followed by a bill of sale of the property to her about the time the mortgage came due. It further appeared that Wright knew all about the note, chattel mortgage and bill of sale and we think the proof was sufficient to show that Wright conspired with Wilson to get possession of the property and defeat the collection of the debt of Mrs. Page and other creditors of Wright. It further appeared that the sale was made in bulk and that the provisions of the statute in regard to the sale and delivery of possession of chattels in bulk by notice and otherwise, was not complied with and therefore by virtue of such statute, the sale was fraudulent and void as against the creditors of Wilson. Rev.Stat.(Hurd) chap. 38a, par. 4. Before the bill was filed Wright had sold substantially all the property he so obtained from Wilson and received therefor the sum of \$1150.00 from purchasers who were not parties to the fraud.

It is claimed by plaintiff in error that the bill in effect seeks to enforce defendant in error's lien upon the property. But even if such lien could have been enforced against the innocent purchasers of the same from Wright, it would be manifestly inequitable to do so when Wright had received this money under circumstances which should be held to show that he did so for the benefit of defendant in error, and

it was proper in equity for the court below to enter a decree against him for the amount of the debt of defendant in error.

The further claim of plaintiff in error that the decree was for too large an amount does not seem to be well founded. Her debt with interest appears to have amounted, at the time the decree was entered, to \$1080.00 which was the amount of principal and interest the decree ordered Wright to pay her and which was less than the amount he had received from the sale of the property. The decree of the court below will be affirmed.

~~*****~~

Affirmed.

(Not to be reported in full.)

M. S. Bridel, having tried this case in the court below, took no part on the hearing in this court.

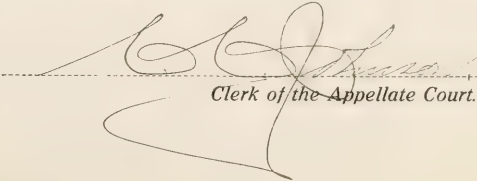
The further alleged to have been in error since his
 decree for too long an amount does not seem to be well
 founded. His last will and testament is not a will
 of the law but a will of the law as it is in the
 hands of the law and the law is the law and the law
 is the law and the law is the law and the law is the law
 from the sale of the property. The decree of the court
 for all be known.

(Not to be printed in full.)

W. B. L. having tried the case in the court
 and that he had in the hearing in the court.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

743

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

✓ Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 151

Poley

ERROR TO
APPEAL FROM

vs.

No. 16

October Term, 1914.

Biscuit COURT

Lawrence COUNTY

Swail

TRIAL JUDGE

HON. *Enoch C. Newton*

Term No. 16.

Agenda No. 31.

October Term, 1914.

A. Pixley,

Appellant,

vs.

John Swail,

Appellee.

Appeal from Lawrence.

Opinion by Higbee, J.

Actual fact
~~Appellant was the assignee of two notes purporting to be signed by appellee, one for the sum of \$2,000.00, dated May 7, 1912, payable fifteen months after date, with interest at the rate of seven per cent per annum; the other for \$1,000.00 dated October 5, 1912, payable one year after date with like interest. Both the notes were made payable to "W. R. Wright and were assigned by him to appellant before maturity. Appellee denied the execution of the notes. And from a judgment in his favor the defendant appealed.~~
The evidence as to the execution of the notes was conflicting. That of the appellant rested on his affidavit.

The real defense raised upon by appellee and the only one raised upon the trial, was that presented by the plea denying the execution of the notes. "W. R. Wright, the payee of the notes, testified that the \$2,000.00 note was given to him by appellee for the latter's interest in some land they owned in partnership in Georgia and that it was signed by him on top of a post of a hitch rack near a drug store in Bridgeport, Illinois; that the \$1,000.00 note was given to him by appellee for lands in Martin county, Indiana, and was executed on a table in the office room of a livery barn in Bridgeport, both notes being executed on the day they bear date; that

October Term, 1814.

Agenda Item 10.

1. Witness
2. Witness
3. Witness
4. Witness

Original of Witness, 1.

Witness was the holder of two notes executed

to the order of the witness, one for \$1,000.00, dated

July 7, 1813, payable to the order of the witness, and one

for \$1,000.00, payable to the order of the witness, and one

for \$1,000.00, payable to the order of the witness, and one

for \$1,000.00, payable to the order of the witness, and one

for \$1,000.00, payable to the order of the witness, and one

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for \$1,000.00, payable to the order of the witness, and one

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he had the notes made out by some one for him; that he did not know who made out the notes but thought it was some one in Bridgeport; that after receiving the notes he wanted to use them to buy automobiles but the party with whom he was dealing refused to take them unless there were witnesses to appellee's signature; that with this in view he drove from West Salem where he lived, to Bridgeport the home of appellee, in company with J. A. Gillespie, a friend, who like Wright was a trader in land and a man named Weber; that they stopped their automobile on a street near the First National Bank in Bridgeport and Wright, leaving Gillespie and Weber in the machine, went in search of appellee whom he soon found and brought back to the place where they were; that he told appellee he wanted some witnesses on the notes and the latter said all right; that at this time Thomas R. Lee and others came up where they were talking; that appellee acknowledged he had signed the notes in their presence and at Wright's request, Lee and Gillespie then signed the notes as witnesses. Wright was corroborated by Lee and Gillespie as to the acknowledgment of his signature by appellee and the signing of the notes as witnesses by them. He afterwards sold the notes to appellant, a banker in West Salem, Illinois, before maturity for \$3,000.00. Weber and another witness, Crawley, testified to being present and hearing appellee acknowledge his signature to some notes, but they could not identify the notes sued on and introduced in evidence as the notes which were produced on the occasion when the signatures are said to have been acknowledged.

The witnesses who testified upon the subject differed somewhat as to the time when the notes were witnessed by Lee and Gillespie. Wright thought it was in October. Lee

...and the notes made out by some one for him; that he did not know who made out the notes but thought it was some one in Bridgeport; that after receiving the notes he wanted to use them to buy automobiles but the party with whom he was dealing refused to take them unless there were witnesses to the collector's signature; that he was in the house of a friend, in Salem where he lived, to Bridgeport the home of a friend, in company with J. A. Gillespie, a friend, the first night was a trader in land and a man named Weber; that they showed their automobiles to a friend with the first night; that Weber and Gillespie and "Right" in the morning, went in search of witnesses whom he soon found and brought back to the place where they were; that he told Gillespie he wanted some witnesses on the notes and the latter said all right; that at this time Thomas R. Lee and others came up where they were talking; that Gillespie acknowledged he had signed the notes in their presence and at "Right's" request, Lee and Gillespie then signed the notes as witnesses. "Right" was corroborated by Lee and Gillespie as to the acknowledged signing of the signatures of Gillespie and the signing of the notes as witnesses by them. He afterwards sold the notes to a bank in West Salem, Illinois, before maturity for \$5,000.00. Weber and another witness, Grayson, testified to being present and hearing Gillespie acknowledge his signature to some notes, but they could not identify the notes sold as the notes in evidence as the notes which were produced on the occasion when the signatures are said to have been acknowledged. The witnesses who testified upon the subject differed somewhat as to the time when the notes were witnessed by Lee and Gillespie. "Right" thought it was in October. Lee

~~fixed the time between the 28th of September and 10th of Oc-~~
~~tober. Gillespie stated it must have been in October and~~
~~Crarley and Weber that it was in the fall of the year. Appel-~~
~~lee testified that he did not sign the notes, ^{which} ~~and~~ on; that~~
~~he never acknowledged them as his notes, or requested any~~
~~one to witness his signatures thereto, and denied that the~~
~~circumstances testified to by witnesses for appellant above~~
~~referred to ever occurred. Appellee also introduced seven~~
~~witnesses, six of them being bank officials, who stated that~~
~~they had seen appellee write and knew his signature and that~~
~~the names attached to said notes purporting to be the signatures~~
~~of appellee, were not his signatures. The trial was had be-~~
~~fore a jury which found the issue for appellee and a motion~~
~~for a new trial having been overruled, judgment was entered~~
~~against appellant for costs.~~

It is the contention of appellant that the proofs in the case, showed a clear right of recovery on his part and that the court erred in the instructions to the jury and the admission of evidence. The questions of fact presented to the jury were whether or not appellee executed the notes in question or acknowledged the signatures thereto, to be his in the presence of witnesses. Appellee having filed a sworn plea denying the execution of the notes, the burden was upon appellant to prove, either that appellee had signed the same or had acknowledged the signatures to be his before the witnesses, and thereby adopted the notes as his own. Wallace v. Wallace, 8 Ill. App. 69. Chicago Elec. Light Renting Co. v. Hutchinson, 25 Id. 476; Soaps v. Eichberg, 42 Id. 375. Zuel v. Bowen, 78 Ill., 234.

"right swore that appellee signed the notes and af-

terwards acknowledged his signatures in the presence of witnesses: and there was the testimony of the two subscribing witnesses that appellee acknowledged his signatures of these notes in their presence and of two other witnesses who testified that they were present when appellee acknowledged his signature to two notes but could not identify these as being the notes. On the other hand, appellee denied positively both the signing of the notes and the subsequent acknowledgment of his signatures and the testimony of the other witnesses above referred to was, that the signatures were not those of appellee. The members of the jury who saw the witnesses upon the stand and heard them testify were convinced of the truth of appellee's statements and found a verdict in his favor, and while the greater number of witnesses to the actual facts testified on behalf of appellant, yet it is well settled that it is for the jury to determine what weight shall be given to the testimony of the witnesses and that their verdict shall not necessarily be determined in favor of the side which produces the greater number. *N. Chicago St. Ry. Co. v. Anderson*, 176 Ill. 635; *Chytraus v. Chicago*, 160 Id. 18; *Totel v. Bonnefoy*, 123 Id. 653 .

Under the proofs we do not feel authorized to disturb the verdict of the jury. Complaint is made by appellant that the court permitted a motion and affidavit filed in the case, to which were attached the true signatures of appellee, to be shown to certain of the expert witnesses introduced by appellee and the opinion of such witnesses to be given as to whether the signatures were in fact those of appellee. The objection raised is that these witnesses are thereby permitted

to compare upon the witness stand, the signatures attached to the motion and affidavit with the signatures to the notes. These witnesses, however, had already testified that the signatures to the notes were not those of appellee and there does not appear to have been in fact any comparison of signatures made by them bearing upon the issue.

In *Int. Melvin v. Hodges*, 71 Ill. 422, it was held that on cross examination for the purpose of testing the accuracy of the witness' observation and memory he might be shown the signature to the plea putting the execution of a note in issue about the genuineness of which there was no question and asked whether that was or was not the genuine signature of the defendant to the suit. It has also been held that the genuineness or otherwise of a disputed signature to a paper otherwise admissible in evidence, may be proved by comparison with the signature admitted or proved to be genuine to a paper which has been properly admitted in evidence under the issues. *Brobston v. Cahill*, 64 Ill. 356; *Himrod v. Gilman*, 147 Id. 293; In *Stitzl v. Miller*, 250 Ill. 72, it is said, "This court has laid down the rule that the genuineness of a signature cannot be proved by comparison with other admittedly genuine handwriting or signatures not admissible in evidence for other purposes or not already a part of the record. When however other writings or signatures admitted to be genuine are already in the case, comparison may be made by the jury with or without experts." And in *Craig v. Trotter*, 252 Ill. 228, it is also said to be well settled, "that when other writings or signatures admitted to be genuine are already in the case, comparison may be made by the jury and by experts testifying to the jury." The papers referred to, while not

Under the provisions of the Illinois Code of Civil Procedure, the court is authorized to permit the deposition of a witness in a civil case, and the deposition of a witness in a criminal case, if the court is satisfied that the deposition is necessary for the trial of the case. The court is also authorized to permit the deposition of a witness in a civil case, and the deposition of a witness in a criminal case, if the court is satisfied that the deposition is necessary for the trial of the case.

to compare upon the witness stand, the signatures attached to the motion and affidavit with the signatures to the notes. These witnesses, however, had already testified that the signatures to the notes were not those of appellee and there does not appear to have been in fact any comparison of signatures made by them.

In *Melvin v. Hodges* 71 Ill. 422, it was held that on cross examination for the purpose of testing the accuracy of the witness' observation and memory he might be shown the signature to the plea putting the execution of a note in issue about the genuineness of which there was no question and asked whether that was or was not the genuine signature of the defendant to the suit. It has also been held that the genuineness or otherwise of a disputed signature to a paper otherwise admissible in evidence, may be proved by comparison with the signature admitted or proved to be genuine to a paper which has been properly admitted in evidence under the issues. *Brobston v. Cahill*, 64 Ill. 350; *Himrod v. Gilman*, 147 Id. 293; In *Stitzl v. Miller*, 250 Ill. 72, it is said, "This court has laid down the rule that the genuineness of a signature cannot be proved by comparison with other admittedly genuine handwriting or signatures not admissible in evidence for other purposes or not already a part of the record. When however other writings or signatures admitted to be genuine are already in the case, comparison may be made by the jury with or without experts." And in *Craig v. Trotter*, 252 Ill. 228, it is also said to be well settled, "that when other writings or signatures admitted to be genuine are already in the case, comparison may be made by the jury and by experts testifying to the jury." The papers referred to, while not

formally introduced in evidence were part of the record and the fact that certain witnesses were interrogated concerning their knowledge of the genuineness of the signatures thereto, does not constitute substantial error in this case.

Appellant further complains that certain of its instructions bearing upon the question of the weight the jury should give to expert testimony, were refused. An examination of these instructions shows that they were either argumentative in form or not carefully guarded and they were properly refused. The judgment of the court below will be affirmed.

Judgment affirmed.

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(Not to be reported in full.)

Normally, instructions are given to the jury in the form of questions, and the jury is asked to answer them. The instructions are given to the jury in the form of questions, and the jury is asked to answer them. The instructions are given to the jury in the form of questions, and the jury is asked to answer them.

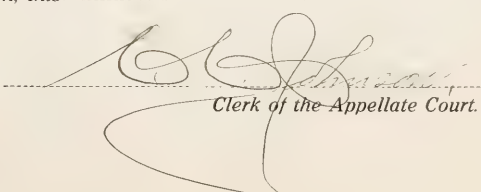
The instructions are given to the jury in the form of questions, and the jury is asked to answer them. The instructions are given to the jury in the form of questions, and the jury is asked to answer them. The instructions are given to the jury in the form of questions, and the jury is asked to answer them.

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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

774

194 A 153

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 153

ERROR TO
APPEAL FROM

Joseph A. O'Hare et al

vs.

No. 18

Carroll COURT

October Term, 1914.

Fayette COUNTY

John E. Johnson et al

TRIAL JUDGE

HON. Thomas M. Harris

Term No. 18.

Agenda No. 86.

October Term, 1914.

Joseph H. O'Hare, et al.,

Appellees,

vs.

Heleen E. Johnston and Mary
B. Johnston,

Appellants.

Appeal from Fayette.

*From a decree and
answering the validity
of such claims as
are appealed.*

Opinion by Higbee, J.

~~This was a bill to construe the will of Benjamin F. Johnston, deceased, and is particularly concerned with the trusts created by the fourth clause of the will. There were seven clauses in the will, which disposed of real and personal property valued at something over \$600,000.00. The first provided for the payment of the testator's debts and funeral expenses; the second bequeathed an annuity of \$500.00 a year to his mother during her life; by the third the testator devised and bequeathed to his wife, Mary B. Johnston, the household, household furniture, horses and carriages and certain city property known as the St. Hotel, for her life and at her death to be divided between his son William M. Johnston and daughter Hazel B. Johnston and also gave her certain bonds, the par value of which amounted to \$36,500.00 in cash. The fourth clause, which is the one to which our attention is particularly directed, placed \$300,000.00, par value, of bonds with trustees, upon certain trusts therein named and is as follows:~~

The ~~fourth~~ ^{clause} ~~trust~~ ^{the} ~~executors, hereinafter~~

appointed, to deliver or pay over to the St. Louis Union Trust ^a Company of St. Louis, Missouri, ~~one or more of the~~ existing under and by virtue of the laws of the State of Missouri, one hundred Gray's Point Terminal Railroad bonds, which they will find among my papers, of the face value of One Thousand Dollars each, ~~a total of One Hundred Thousand Dollars, and one hundred Trinidad Electric Railroad Company bonds, which~~ ^{of an equal value} ~~will also be found among my papers, of the face value of One Thousand Dollars each, a total of One Hundred Thousand Dollars.~~ Should any of said bonds be matured or for any reason paid or sold, or transferred by me before my death, I hereby direct my executors to turn over to said Union Trust Company, in lieu thereof, securities to the value of the bonds so ~~paid or~~ that have been so paid off, transferred or assigned, or in lieu of said securities, to pay to the said Trust Company one half to make up the fund above directed to be deposited with the said St. Louis Union Trust Company, and I hereby direct said Trust Company, Trustee of said fund and direct that it shall ^{with said fund} ~~invest said fund~~ in trust for the period of thirty (30) years after ^{the testator's} ~~my death, and I direct said Trust Company to keep said~~ fund invested in so far as any part of it should be paid to it in cash, or securities other than above named bonds, by my executors, or should any of said Gray's Point or Trinidad Bonds be redeemed or paid after my death and before the expiration of the period of said trust, so as to secure the highest rate of interest for said fund ~~and conservative investment,~~ ^{and} said fund so invested during the period of this trust: I direct said Trust Company to pay ^{and} ~~one half~~ ^{and annually} of the income arising from ^{the} ~~said trust fund, after deducting the expenses of administration for acting as such trustee, to my son, William M.~~

The testator's

[illegible]

Johnston, and one half to my daughter, Hazel D. Johnston, ^{and}
~~that said payments shall be made semi-annually.~~ ^{And} At the ex-
piration of said period of thirty years, ^{to divide the trust fund} I direct ~~said Trust~~
~~Company to deliver to said William M. Johnston Fifty Thousand~~
~~Dollars per value of said Gray's Point Terminal Railroad Com-~~
~~pany bonds, and fifty thousand dollars per value of said Trin-~~
~~idad Railroad Company bonds, or deliver to him the securities~~
~~or pay to him the cash held by said Trust Company at that~~
~~time, in lieu of said bonds, and also deliver to my daughter,~~
~~Hazel D. Johnston, Fifty Thousand Dollars per value of said~~
~~Gray's Point Terminal Railroad Company bonds and Fifty Thou-~~
~~sand Dollars per value of said Trinidad Electric Railroad Com-~~
~~pany bonds or deliver to her the securities, or pay to her~~
~~the cash held by it in lieu of said bonds.~~

In the event of the death of either of my said chil-
dren, William M. Johnston and Hazel D. Johnston, ^{without} ~~issue~~
^{the testator} ~~before my death, I direct that the whole of the above~~
~~named trust fund shall be held for the use of the survivor and~~
~~the income therefrom paid to the survivor, and in the event~~
~~of the death of either of my said children after my death and~~
~~before the expiration of the above trust without issue, I di-~~
~~rect that the income from the whole of said trust fund and~~
~~the whole of the trust fund itself be paid to the survivor,~~
~~but in the event that either of my said children die, leaving~~
~~a child or children either before my death or before the ex-~~
~~piration of the period of said trust, I direct that the income~~
~~from said trust fund and the principal of said trust fund at~~
~~the expiration of said period, hereby given to its or their~~
~~parent, be paid to said child or children.~~

~~The fifth, which is the residuary clause of the will,~~

The above is a true and correct copy of the original as the same was
 presented to the Board of Directors of the City of New York on the 1st day of
 January, 1901, and the same was read and approved by the Board of Directors
 of the City of New York on the 1st day of January, 1901.

In the event of the death of either of my said child-
-dren, William H. Johnston and Howard D. Johnston, I direct that the whole of the estate
-of the said deceased child shall be paid for the use of the surviving child
-and the survivor shall be the survivor and the survivor shall be the survivor
-of the death of either of my said children either my said child
-before the expiration of the above stated period, I di-
-rect that the income from the estate of said child shall be
-the whole of the trust fund itself be paid to the survivor,
-but in the event that either of my said children die, I direct
-a child or children either before or after the ex-
-piration of the period of said trust, I direct that the income
-of said trust fund on the principal of said trust fund, I
-direct that the expiration of said period, hereby given to the said
-parent, be paid to said child or children.

Directed the executors to convert all the rest and residue of the estate, both real, personal and mixed, as soon as it could conveniently be done after the testator's death, into cash and to divide the proceeds into three equal parts, giving one-third to his wife, Mary B. Johnston, one-third to his son, William M. Johnston and the remaining third to his daughter, Hazel D. Johnston, with the further provision that the property therein given to the testator's wife, should be in lieu of all dower interest and widow's ward in his estate. The ~~clerk~~ ^{clerk} requested the executors to retain the testator's secretary as book-keeper and confidential clerk, during the settlement of the estate, and the seventh and last appointed his son, William M. Johnston of St. Elmo, Illinois, and George F. Towner of Vandalia, Illinois, executors.

This will was executed by the testator, Benjamin F. Johnston, July 2, 1904. He was at the time 53 years of age and his immediate family consisted of his wife, Mary B. Johnston, then in her 53 year, his son William M. Johnston, 21 years of age and who had been married about a year, and his daughter Hazel D. Johnston, between 17 and 18 years of age, then unmarried. The testator died on February 2, 1905, leaving his family as above named and an estate, which was substantially of the same value as at the time the will was made. Shortly after the death of the testator, the will was admitted to probate and the executors named therein qualified as such and took charge of the estate. A few months later, the executor delivered to the trust company named in the fourth clause of the will, the bonds therein referred to and the trust company accepted the trust. On July 15, 1905, Hazel D.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the American People's Party in the United States. This is a serious matter, as the Commission is required to report to the President on the activities of the American People's Party in the United States.

[illegible]

Johnston, married the appellee Joseph H. O'Hare and about two years later, in 1907, she gave birth to a child which was named Mary Hazel O'Hare. The Trust Company, from the time it took over the bonds, up to January 1, 1913, paid the income arising from the trust fund to William M. Johnston and Hazel D. Johnston O'Hare. ~~At the time the will was made, William,~~ was not in business but he with his wife, was living at his father's home in St. Elmo and was dependent upon his father for his maintenance. Hazel, the daughter, ~~was a married girl~~ and naturally, under those circumstances and at her age, was without any business experience. On January 30, 1913, nearly eight years after the death of the testator, his son William M. Johnston, departed this life intestate ~~at St. Louis, Mo-~~ ~~souri,~~ leaving no children but leaving surviving him as his only heirs at law, his wife Helen E. Johnston, his mother Mary E. Johnston and his sister Hazel D. O'Hare. Shortly afterwards, on May 15, 1913, Hazel D. O'Hare, departed this life intestate ~~at St. Elmo, Illinois,~~ leaving surviving her, as her only heirs at law, her husband Joseph H. O'Hare and her daughter Mary Hazel O'Hare. Helen E. Johnston, the wife of William, was duly appointed administratrix of the estate of her deceased husband and is now so acting and Joseph H. O'Hare, the husband of Hazel was appointed and is now acting as administrator of the estate of his deceased wife. Shortly after the death of Hazel D. O'Hare, a bill was filed to the ~~August term, 1913, of the circuit court of Fayette county,~~ to construe the will and afterwards on February 20, 1914, an amended bill was filed, upon which the case was tried. The complainants in the bill, as amended, are Joseph H. O'Hare, who sues individually and as administrator of the estate of

[illegible]

his deceased wife, Hazel D. O'Hare and Mary Hazel O'Hare, she appears by Charles Bennyhoff as her guardian. The defendants are Mary B. Johnston, the widow of the testator, Helen E. Johnston, the widow of William M. Johnston, who is sole defendant both in her own proper person and as administratrix of the estate of her deceased husband, George T. Turner, surviving executor of the last will and testament of said testator and the St. Louis Union Trust Company of St. Louis, Missouri. During the progress of the suit and before the same was entered, George T. Turner, the surviving executor, departed this life and the said Mary B. Johnston, widow of the testator was appointed administratrix de bonis non with the will annexed of her deceased husband's estate and entered her appearance as such administratrix in this suit. It also appeared that H. G. Harris is, an attorney of the Fayette County, Missouri appointed guardian ad litem for said infant Mary Hazel O'Hare.

Answers were filed by the respective defendants and the court afterwards decreed, among other things; that the fourth clause of said will and every provision therein contained, was valid; that it was the intention of the testator that the securities named therein, should be turned over to said Trust Company as trustee, for the period of thirty years, for the benefit of the testator's children, William M. Johnston and Hazel D. O'Hare; that said William M. Johnston and Hazel D. O'Hare took a vested equitable interest in said trust estate subject to be divested upon the death of either within the term of the trust; that upon the death of the said William M. Johnston without leaving any child surviving him, his sister Hazel D. O'Hare acquired an equitable determinable title to the whole of said trust estate with enjoyment in possession.

[illegible]

session postponed until the end of the thirty year period and subject to be divested, should she depart this life within that period; that said Hazel D. O'Hare, having died leaving surviving her Mary Hazel O'Hare her only child, the latter is now the absolute equitable owner of said entire trust fund with the enjoyment in possession thereof postponed until the said thirty year period shall have elapsed; that said Mary Hazel O'Hare is entitled to receive the income and profits from said trust fund during the period for which said fund was created. It was further decreed that the trusteeship created by the fourth clause of said will should continue for said thirty year period, that is until January 5, 1935 and that at the expiration of said time said trusteeship should come to an end and the trustee should pay over to said Mary Hazel O'Hare, her heirs and assigns the corpus of said trust fund less its proper charges. There was also a provision in the decree for the payment of certain solicitors fees, which will be considered later on. From this decree the defendants Helen E. Johnston and Mary B. Johnston appealed to this court in order that the record may be reviewed and it may be determined whether the court below properly construed the provisions of the will in question.

We have been furnished with most able and voluminous briefs in this case, covering every phase of the controversy between the parties. The decree of the court below was not in conformity with the views of appellants or appellees, and the latter have filed cross errors. A brief however is filed by the guardian ad litem for the infant, Mary Hazel O'Hare and for the St. Louis Union Trust Company, expressing

admission proceedings until the end of the thirty days after the
subject to be discussed, and all the papers and the evidence
that period, that said Hazel O'Hara, having been admitted
admission proceedings until the end of the thirty days after the
is not the admission proceedings until the end of the thirty days after the
with the admission proceedings until the end of the thirty days after the
and thirty days after the admission proceedings until the end of the thirty days after the
Hazel O'Hara is entitled to receive the income and profits
from said trust fund during the period for which said trust
was created. It is further ordered that the admission proceedings
created by the court in the admission proceedings until the end of the thirty days after the
for said thirty days period, that is until January 3, 1921
and that at the expiration of said time said admission proceedings
should come to an end and the trustee should pay over to said
Mary Hazel O'Hara, her heirs and assigns the income of said
trust fund and the admission proceedings until the end of the thirty days after the
in the decree for the payment of certain admission proceedings
which will be considered later on. From this decree and the
admission proceedings until the end of the thirty days after the
this court in order that the record may be revised and it may
be determined whether the court order of admission proceedings until the end of the thirty days after the
revised at the end of the admission proceedings until the end of the thirty days after the
It has been furnished with most care and attention
one article in this case, covering every phase of the controversy
exists between the parties. The history of the court order and
not in conformity with the admission proceedings until the end of the thirty days after the
and the latter order shall be a final order. A final order shall be
filed by the admission proceedings until the end of the thirty days after the
O'Hara and for the 25. In the admission proceedings until the end of the thirty days after the

~~satisfaction with the devise as it is and advancing reasons why it should be sustained without change. The main contention of appellants and the one to which we shall devote the greater part of this opinion, is that the fourth clause of the will above set out, is obnoxious to the rule against perpetuities. If this contention is correct then the fourth clause of the will cannot stand and it will ^{not} be necessary to discuss at length the other questions raised. The rule against perpetuities as stated by Gray (3rd Ed. sec. 201) is "No interest is good unless it must vest if at all not later than 21 years after some life in being at the creation of the interest." In Buckton v. Hay 11 Ch. Div. 645 (1879) Jessel, Master of the Rolls, after speaking of the inclination of the courts to favor the alienation of property says that in order to carry out that design, the chancellors established a rule, "That property could not be tied up longer than for a life in being and 21 years after." In Bigelow v. Cady 171 Ill. 239, Mr. Chief Justice Phillips said upon this subject "Perpetuity is a ~~fixity~~ limitation taking the subject matter of the perpetuity out of commerce for a period of time greater than a life or lives in being and 21 years thereafter. If, by any possibility, a devise violates the rule against perpetuities it cannot stand. If there is a possibility that a violation of this rule can happen, then the devise must be held void. (Waldo v. Cummings 45 Ill. 421. Post v. Rohrbach 123 Ill. 600. Dedford v. Dedford 28 Md. 176. Sears v. Putnam 102 Mass. 6. Gray on Perpetuities secs. 214-262 and 374.) Neither will the violation of the rule against perpetuities be tolerated when the property is covered by a trust, any more~~

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than when such violation actually appears in the creation of a legal estate. Courts of equity will not permit limitations of future equitable interests to transcend those of legal interests, which are upheld as executory devises and shifting and springing uses at law. *Hove v. Hodge* 153 Ill. 353." It appears that the rule against perpetuities is so inflexible that it must appear certain that the contingent event upon which the vesting of an interest may depend, will absolutely occur within the time limited by the rule and if there is any doubt concerning the matter, the disposition of the property sought to be made will be obnoxious to the rule. Gray in section 314 of his work on Perpetuities above referred to states the rule as follows: "It is not enough that a contingent event may happen or even that it will probably happen within the rule against perpetuities; if it can possibly happen beyond those limits, an interest conditioned on it is too remote." While the rule against perpetuities may possibly be invoked most frequently in cases involving the attempted disposition of real estate, yet it applies with equal force to provisions in instruments disposing of personal property which offend against the rule. The Rule against Perpetuities (Gray's 3rd Ed.) Sec. 300.

In determining whether or not any provision is within this rule, it is of prime importance to determine when the title to the property in question actually vested. If the title vested within the period named, it is immaterial whether the person in whose favor it is made has the right to possession or enjoyment of the same within that period. See *ver v. Fitzgerald* 141 Mass. 401. *Lavel v. Staffell* 64 Tex. 3-70.

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It may be said in this connection to be a universal rule, that the law favors vesting of estates rather than the title should be held in abeyance. Kohtz v. Eldred 206 Ill. 60. Becker v. Becker 206 Id. 63. Flanner v. Fello s 11. 12 C. Sumpter v. Carter 115 Ga. 383 . It is also true that a legacy will be vested immediately unless a contrary intention is clearly manifest on the part of the testator. Armstrong v. Barber, 259 Ill 369. Kohtz v. Eldred, supra. In determining when a title vests, the intent and desire of the testator as shown by the will is of controlling importance. In Pearson v. Hanson 230 Ill. 610 Mr. Justice Vickers delivering the opinion of the court stated, "Cases of present vesting of title where the enjoyment in possession is postponed are often difficult to distinguish from cases where the title is only to vest on some future contingency which may or may not happen. In determining this question the legally expressed intention of the testator as found within the four corners of the will must be the chart and guide of the court. That this great, fundamental rule may prevail the and property of the testator to the posthumous person intended by the owner other rules are made and unmade. One test given for the decision of the question is to consider the object of the testator in fixing upon a future period for the devisee to come into the enjoyment of the estate. If it appears that the controlling purpose was personal to the devisee then the estate will not vest until the time appointed, and is contingent upon the devisee being alive when the time designated is reached." In determining when the title to the trust fund in section four of the will in question, vested, it is therefore necessary to first ascertain the intention of

It may be said in this connection that the law favors vesting of estates rather than the postponement of the vesting of estates. It should be held in accordance with the law. In *Becker v. Becker*, 200 Ill. 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

the testator in that regard. In *Armstrong v. Barber*, supra, it is said, "The paramount rule in the exposition of wills, to which all others must bend, is, that the intention of the testator as expressed in the will must be ascertained and given effect if not prohibited by law. (*Bradley v. Wallace* 208 Ill. 238; *Wardner v. Memorial Board*, 333 Id. 606.) So far has this principle been carried, that this court quoted with approval in *Orr v. Yates*, 309 Ill. 323, that 'cases on wills may guide us to general rules of construction, but unless a case cited be in every respect directly in point and agree in every circumstance it will have little or no weight with the courts, who always look upon the intention of the testator as the polar star to direct them in the construction of wills.'" But while the will must be construed to give effect to the intent of the testator, yet that intent must, to a large extent, be determined from the language of the will itself. In *Phayre v. Kennedy* 169 Ill. 360, the statement is made, "The fundamental rule in construing a will, is to ascertain the intention of the testator. This is to be gathered from full consideration of the whole will, its scope and plan and its various provisions, all of which are to be given full and just operation unless insurmountable repugnancy is found or some principles of public policy or legal rule of property contravened."

By the provisions of the fourth clause of the will, the St. Louis Union Trust Company was appointed trustee of the fund mentioned and directed to hold the same in trust for the period of thirty years after the death of the testator and to keep the said fund invested during the period of said trust. There was the further direction that it pay one half of the

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income arising therefrom, after deducting its reasonable compensation as trustee, to the testator's son, William M. Johnston, and the other half to his daughter Hazel D. Johnston in semi-annual payments; that at the expiration of said period of thirty years it deliver to the son, one half of said fund and to the daughter the other half either in securities or cash held in lieu thereof; that in the event of the death of either of said children without issue before the death of the testator, the whole of the trust fund should be held for the use of the survivor and the income therefrom paid to the survivor. Then followed the following language particularly applicable to the facts of the case as they now exist; "And in the event of the death of either of my said children after my death and before the expiration of the above trust without issue, I direct that the income from the whole of said trust fund and the whole of the trust fund itself be paid to the survivor, but in the event that either of my said children die, leaving a child or children either before my death or before the expiration of the period of said trust, I direct that the income from said trust fund and the principal of said trust fund at the expiration of said period, hereby given to its or their parent, be paid to said child or children." In the consideration of wills, the court may always look to the circumstances under which the testator made his will, the state of the property, his family and other circumstances then existing, likely to throw a light upon his intention, due effect being given of course to the language used by him. *Armstrong v. Barber*, *supra*. *Ingraham v. Ingraham* 169 Ill. 487. The testator was a man of large property, which he devised by his will, to leave to his family, consisting of his

The testimony of the witness, who was present at the time of the explosion, is that the explosion occurred at the time the witness was in the room, and that the explosion was caused by the gas which was in the room. The witness further testified that the explosion was caused by the gas which was in the room, and that the explosion was caused by the gas which was in the room.

and two children. It was his evident desire that the division should be made between the three upon somewhat equal terms, the provisions made for the son and daughter being exactly the same. Certain of the provisions made for the wife were only life interests, which after her death, would go to the son and daughter. At the time the will was made, however, the son was only 21 years of age, was without business experience and with his wife, was living at home with his father and mother, dependent upon the father for maintenance. The proofs show that he was not interested in business and did not give it any attention and, prior thereto "had exhibited a total lack of steadiness of character or aptitude for business." These facts were known to the father, were subject to remark by him and he had "expressed a doubt about the boy ever settling down to business and handling money and whether or not he would be able to take care of himself through life." The daughter was a school girl, 17 years of age, but accustomed to spend a good deal of money which her father gave her. With these facts in view the testator, while amply providing for both son and daughter, determined to tie up a portion of his estate by way of a trust for a period of thirty years, so that his son and daughter should be provided for during that period beyond peradventure of a ~~xxxxxxxxxxxx~~ doubt, regardless of what might become of the rest of the estate. According to the terms sought to be imposed by this provision of the will if the two children should live to the expiration of the period of thirty years after the death of their father, they would then come into possession of the respective funds provided for them by the trust; or if one should die and the other survive that period the survivor would come into possession of the whole fund at that time. But if it should hap-

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When that both should die within nine years after the death of the testator, then the period provided for the trust would not expire until more than 21 years after their decease and should both son and daughter be without issue at the death of the testator, the trust would extend for a longer period than that covered by a life or lives in being and 21 years thereafter, The latter possibility became a fact and at the time of the death of the survivor of the two children of the testator, more than 21 years yet remained for the trust imposed by the will for their benefit. It follows that if the fund covered by the trust did not vest in the children of the testator until the expiration of the trust, thirty years after his death, then clause four of the will, making the trust provision, would be void as it would transgress the rule against perpetuities. If however, the fund vested in the children of the testator at his death, then the rule would not apply for, as above stated, it is the time of the vesting of the estate which determines whether the rule shall or shall not be applicable.

The circumstances surrounding the making of the will, as well as the language itself used in the clause under consideration, would naturally lead to the conclusion that the testator intended to segregate this fund from the rest of the estate and keep it in the hands of the trustee for the purposes named for the period of thirty years. It would appear to be plain that the testator intended that his children should have no absolute interest in the fund until the end of the said period. In fact counsel for the Trust Company and the minor defendant Mary Hazel O'Hare, state in their argument in speaking of the fourth clause of the will "Here is a clearly expressed intent that as long as William and Hazel both

1. That the said deceased was a resident of the County of ... State of ... at the time of his death; and that he was a citizen of the United States.

2. That the said deceased was a resident of the County of ... State of ... at the time of his death; and that he was a citizen of the United States.

3. That the said deceased was a resident of the County of ... State of ... at the time of his death; and that he was a citizen of the United States.

4. That the said deceased was a resident of the County of ... State of ... at the time of his death; and that he was a citizen of the United States.

5. That the said deceased was a resident of the County of ... State of ... at the time of his death; and that he was a citizen of the United States.

6. That the said deceased was a resident of the County of ... State of ... at the time of his death; and that he was a citizen of the United States.

7. That the said deceased was a resident of the County of ... State of ... at the time of his death; and that he was a citizen of the United States.

8. That the said deceased was a resident of the County of ... State of ... at the time of his death; and that he was a citizen of the United States.

9. That the said deceased was a resident of the County of ... State of ... at the time of his death; and that he was a citizen of the United States.

10. That the said deceased was a resident of the County of ... State of ... at the time of his death; and that he was a citizen of the United States.

lived neither of them should receive any absolute interest in the corpus of the estate until the end of thirty years," and does it appear to us that there was anything in the will to indicate that it was the intention of the testator that any possible issue of William or of Hazel should receive an absolute interest in the corpus of the estate until the end of ~~thirty~~ said period. It is a general rule that where a gift of personalty is contained only in a direction to pay or divide at a future time, which is not connected with the legatee such as at the expiration of a certain number of years from the testator's death, it is contingent upon the legatee surviving that time and the interest does not vest at the testator's death. *Reid v. Voorhees* 216 Ill. 238; *Shell v. Deo*, 2 Salk 415; *Brace v. Charlton*, 13 Sim. 65. In re Eve 93 L.T.R. 335; In re Cartledge 39 Beav. 583; *Hall v. Terry* 1 Atl.502.

It has been said that "the language of a judicial decision is always to be construed with reference to the circumstances of the particular case and the question actually under consideration; and the authority of the decision as a precedent, is limited to those points of law which are raised by the record, considered by the court and necessary to the determination of the case." Black's Law of Judicial Precedents sec. 11. *Bradley v. Lightcap* 202 Ill. 154. It has also been held that cases on wills may be a guide to general rules of construction, but unless cases cited be in every respect directly in point, they will have little or no weight with the courts who always look to the intention of the testator, although they may assist in guiding us to the general rules of construction. *Armstrong v. Barber*, supra. We think however, that a reference to the case of *Reid v. Voorhees*, supra, is

of value in this case for the reason that the questions there considered by our supreme court, were in material respects similar to those presented to us here. In that case James Reid, the testator, after providing for the payment of his debts, gave and bequeathed the remainder of his personal property to two nephews, sons of a deceased sister, John Blackley and Daniel Blackley. Section three of his will was as follows: "I give and bequeath to my nephews, Robert Reid, William Reid, John Reid, Roy Reid and my nieces, Ann Kaickerbarker and Rose Frederick, all of the county of Fulton and State of Illinois, the rents that is collected by my executor from my real estate hereinafter described, the said rents to be divided equally among the above named nephews and nieces and to be paid to them yearly (if so collected) for a period of thirty years. In case any of the above named should die without an heir, his or her share to go to the living heirs." The fourth clause gave a small undivided interest to one of the nieces, which the testator owned in her father's estate and the fifth clause proceeded as follows: "Thirty years after my death I give and bequeath to my above named nephews and nieces, or their heirs, and if no heirs to be divided equally among the surviving heirs, all of my above described real estate, to be divided equally among them, said, real estate to be sold and the proceeds of sale divided equally." A bill was filed by the devisees referred to in the third and fifth clauses to construe the will and a decree was entered in which it was found that both the third and fifth clauses of the will were void as creating a perpetuity in the lands therein mentioned and the other clauses of the will were sustained and partition of the lands ^{was} decreed between the con-

plainants and the said John and Daniel Blackley. From this decree the complainants below appealed, assigning as error that the decree was contrary to law and equity. The supreme court affirmed the decision of the court below in so far as it held the third and fifth clauses to be valid. In the course of its opinion the court said, "The scheme of disposition that the testator attempted to and did provide for in his will was, that the lands should be held by his trustee or executor for thirty years; that he should collect the rents and profits of the lands during that time and divide them equally among the appellants, and at the expiration of thirty years he should sell the lands and divide the proceeds among appellants or their heirs, or the survivors of them. There is no present grant of the corpus to the appellants, but the grant is preceded by the expression, 'thirty years after my death', etc. The intention is further evidenced by the last provision of the will that refers to the executor, wherein it is said that if he cannot let will the time named in the will he may appoint some other party to fill the time therein named. Then this last provision and the third and fifth clauses of the will are read and considered together, there is nothing found in the will with reference to the real estate that is either irreconcilable with or repugnant to the general intent of the will, but, on the other hand, the whole scheme as entertained by the testator and manifested by his will is harmonious in all of its parts, and the only vice contained in it or objection that can be urged against it is that it is contrary to the rule against perpetuities. Under such circumstances and in such a case, the court is not authorized to reject

words or supply them, but its duty is to consider the will according to the law and to hold the provision void because it offends against the law." And further on in the opinion it is said, "We are therefore of the opinion that the court below correctly held that the third and fifth clauses were invalid." It was clear that the supreme court held in that case that the gifts to the nephews and nieces contained in the direction to divide at a future time, namely, thirty years after the testator's death, must be contingent upon their surviving that period, and that therefore such items of the will were void because contrary to the rule governing perpetuities. In the will under consideration, the direction was the trustee should "hold said funds in trust for the period of thirty years after my death"; that it should "keep said fund so invested during the period of this trust"; that "at the expiration of said period of thirty years" the fund should be delivered to and divided between the testator's son and daughter. There was also the further direction that in case one of his children should die leaving a child or children either before the death of the testator, or before the expiration of the period of trust, the income from said trust fund and the principal of said trust fund at the expiration of said period, thereby given to its or their parent, be paid to said child or children. The whole tenor of the fourth clause of the will would seem to indicate that it was the intention of the testator that the beneficiaries herein named, should take the trust fund "at the expiration of said period of thirty years" and that the gift to them under said clause, was contingent upon their surviving the thirty year period. The reasoning in the case last referred to, would

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leave the sum of \$5,000.00 to be paid by the trustees to a grand-son, according to certain instructions therein contained, the will provided as follows: "All the rest, residue and

therefore seem to be equally applicable to the provisions of the will under consideration in this case and by the same course of reasoning the conclusion should be reached that the gift provided for in section four of the will of the testator, Benjamin F. Johnston, did not vest in the beneficiaries at his death and that such provision was void because of being obnoxious to the rule against perpetuities. In this connection it is proper to call attention to the case of Armstrong v. Barber, supra, where the questions arising are claimed by appellees to more nearly correspond to those in controversy in this case, than the questions involved in Reid v. Voorhees. In that case all of the property of the testator was conveyed to trustees for the purposes named in the will and after setting aside the sum of \$5,000.00 to be paid by the trustees to a grand-son, according to certain instructions therein contained, the will provided as follows: "All the rest, residue and remainder of my estate, after the payment of my debts and the setting aside of the said five thousand dollars (\$5000) fund last above mentioned, shall be held, managed, controlled and invested or re-invested by my said trustees for the period of not to exceed ten (10) years from and after the probate of this will. All of the income arising from said residue, after the payment of the necessary expenses and a reasonable compensation to my said trustees for their services, shall be paid out by them as follows: One-third (1/3) thereof to my son Arthur H. Mix, one-third (1/3) thereof to my son George H. Mix and one-third (1/3) thereof for the use, benefit, support and education of my daughter, Elsie H. Mix, such payments to be made at the end of each and every six (6) months' period,

therefore seem to be usually applicable to the provisions of
the will under consideration in this case and by the same
course of reasoning the same should be applied to the
gift provided for in section four of the will of the testator.
Benjamin F. Johnson, his next and last surviving son of his
death and that said provision was also one of the same
nature as the other provisions of the will. It is true
it is true in all respects as the law is applied to
Baker, says, "where the instrument relating to the same by the
testator to more fully express his intent in relation to the
this case, than the provisions relating to the same. In
that case all of the property of the testator was conveyed to
trustees for the purpose of the will and after setting
aside the sum of \$5,000 to be held by the trustees as a
trust for the testator's widow for life, the balance of the
estate was divided as follows: "The first third, to be held for
the life of the widow, after the payment of all debts and the
settling value of the real estate in said will (1900) and the
above mentioned, shall be held, managed, controlled and dis-
posed of or re-invested by the said trustees for the benefit of
the said widow (1900) and after the death of the widow
this will. All of the income arising from said real estate, after
the payment of the necessary expenses and a reasonable sum
for the payment of the said trustees for their services, shall be
paid out by them as follows: One-third (1/3) shall be paid to
Arthur H. Mix, one-third (1/3) shall be paid to the said
the said (1/3) shall be paid for the said (1/3) shall be paid
and the said (1/3) shall be paid to the said (1/3) shall be paid
be made at the end of each and every six (6) months, to be

dating from the probate hereof." There was also a provision giving the trustees authority in their discretion to make payments of the sums set aside, to the testator's sons and daughter after five years from the probate of the will and prior to the expiration of the ten year period, and also the further provision if said residue should not have been paid over within said limit of time, that at the expiration of said ten year period the trust should terminate as to the interests of two of the children and their shares at once, ~~in~~ turned over to them. In that case the gift to the individuals named was held to be vested on the testator's death. To discuss this case fully would enlarge this opinion beyond reasonable limits but we will content ourselves with saying that there the postponement of the payment of the fund for ten years from the probate of the will was held to be for the convenience of the estate. There were special phrases repeated over and again which appeared to show that the testator intended ~~for~~ that the interest should be vested upon his death and therefore for these and other reasons arising out of the consideration of the opinion, we have arrived at the conclusion that the case of Armstrong v. Barber and the reasons given by the supreme court, in considering the same, for holding that the interests mentioned vested at the death of the testator, are not applicable to the provisions of the will presented for our consideration in this case.

In arriving at a conclusion and preparing an opinion in this case, we have received valuable assistance from an able, well considered and luminous opinion of the court of Civil Appeals for the Second Supreme Judicial District of the State of Texas in the case of Bernie L. Anderson et al.

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On 11/11/1964, the following information was received from the Bureau of the Federal Bureau of Investigation (FBI) regarding the activities of the Central Intelligence Agency (CIA) in the United States:

v. Bessie Menefee et al. In the will which was under consideration in that case, the testator devised and bequeathed all of his estate to his executors subject to certain trusts therein named. In the execution of such trust it was provided that the executors pay to his wife during her lifetime, such portion of the rents and other income from the estate, as they might deem proper and that at her death one-fourth of his estate should become the property of his son, Bernie L. Anderson and that the remaining three-fourths should pass to and be vested in his executors on conditions and subject to certain trusts. Item six of the will was as follows:

"The remaining three-fourths(3/4) of my estate not hereinbefore bequeathed and disposed of shall upon the death of my wife, Lizzie Anderson, be used, managed, possessed and controlled by my executors according to their best judgment and discretion. The net income of the same or so much thereof as my executors shall deem proper shall by them be paid to my daughters, Mrs. Flora Berney (nee Flora Anderson), Mrs. Bessie Menefee (nee Bessie Anderson) and Hattie May Anderson for the period of thirty years from the date of my death in such proportions as to my executors may seem proper. And should either of my said daughters die before the expiration of said thirty years after my death, then the share of the income of my estate which would under this will go to such daughter, or so much as my executors shall see proper to pay them, shall be by them paid to the descendant or descendants of such deceased daughter until the expiration of the said thirty years. But should either of my daughters die before the expiration of thirty years from my death without issue,

v. Estate of Katherine (1934-1 CB 301). In that case, the executor was given the discretion to distribute the corpus of the trust to the surviving issue of the testator. The court held that the executor's discretion was not limited by the fact that the trust was for the life of the testator. The executor was given the discretion to distribute the corpus of the trust to the surviving issue of the testator. The court held that the executor's discretion was not limited by the fact that the trust was for the life of the testator.

then, one-third of the one-fourth of my said estate which could have passed to such daughter under this will shall pass to and vest in my son Bernie L. Anderson, and the title to and possession of the other two-thirds of such property of my estate shall pass to and be vested in my said executors, who shall continue to manage the same and dispose of the net income therefrom in accordance with this will, paying to my surviving two daughters, or the heirs of their body as the case may be, the net income thereof, or such portion of the same as they may deem proper. And if thereafter another one of my daughters shall die before the expiration of said thirty years from the date of my death without issue then one-half of the proportion of the said estate to which she would be entitled shall go to and be vested in my son Bernie L. Anderson, and the title to the other one-half of which shall pass to and be vested in my said executors who shall continue to manage the same in all respects as herein directed for the other portions of my estate, and to pay out the net income therefrom to my surviving daughter or to the heirs of her body, or such portions thereof as they may deem proper. And if the other one of my daughters should die before the expiration of the said thirty years from the date of my death without heirs of her body, then, and in that event, all of said estate shall pass to and be vested in my son Bernie L. Anderson."

Item seven of the will contained the following provision: "I will and direct that at the expiration of thirty years from the date of my death my said executors shall pay over and convey to my said daughters or to the heirs of

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the body of such of them as may have died before said time, all of my estate and the accumulations thereon in equal proportions; that is to say, to each of my daughters one-third, or if either of my said daughters be at that time deceased, the heirs of the body of such daughter one-third." Then followed in the same clause a provision directing how said estate should be divided in case of the death of one or more of the daughters without issue before the expiration of said thirty years, in substantially the same terms as were used to refer to like conditions in item six of the will. The testator in that case was evidently trying to accomplish the same end as the one in the case under consideration, although the motives prompting him to do so, may or may not have been the same. In both cases the estates were placed in trust for the period of thirty years with substantially the same provisions made in each concerning the beneficiaries and their survivors. The provision concerning the final disposition of the fund in the will in the Texas case was: "I will and direct that at the expiration of thirty years from the date of my death, my said executors shall pay over and convey to my said daughters all of my estate and the accumulations thereon" and in the will before us the directions were that the trust company should "hold said fund in trust for the period of thirty years after my death" and "at the expiration of said period of thirty years, I direct said trust company to deliver" said fund to said beneficiaries; and at the very close of said clause four, after referring to the possible event of the death of either of the testator's children, leaving a child or children before the expiration of the trust period it is

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said, "I direct that the income from said trust fund and the principal of said trust fund, at the expiration of said period

hereby given to its or their parent be paid to said child or children." In the Texts case a bill was filed to construe the will soon after the death of the testator and the trial court adjudged the same invalid upon the ground that it violated a section of the Texas constitution forbidding perpetuities. The provision of the constitution of that state forbidding perpetuities is substantially the same as the ancient rule against perpetuities, originating in England and now prevailing in this and other states of our union. The opinion of the court of Civil Appeals by Conner, Chief Justice, covered every phase of the propositions applicable to the case and in the conclusion arrived at the judgment of the court below was affirmed and the will held void "on the ground that it violates the rule against perpetuities." In the course of the opinion it is said "at no time are the words 'vest or vested' used with reference to either of his daughters or their issue, but in each and every instance where they are referred to, words of futurity are used and in no instance is there any language from which it is to be implied that the descendants of the daughters were to have any character of vested interest in the corpus of the property until the end of the thirty years, when the testator in explicit and certain terms directed that the estate and its accumulations should be paid over and conveyed. In brief, it seems to us that the will clearly shows that the testator not only knew what he wanted, and the effect of terms to accomplish his desires, but also filled that the beneficial interest in

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his estate intended for the daughters should not become their own until the expiration of the thirty years, this postponement of right being doubtless for the supposed benefit of the daughters and arising from some real or fancied want or need other than as provided, or some real or fancied want of capacity in the daughters to prudently manage large properties. From the foregoing conclusions we can but hold that regardless of any distinction between real and personal property, the estate intended for Mr. Anderson's daughters did not, under the terms of his will, pass to them upon his death nor at any time thereafter. Nor will it so pass until the expiration of the thirty years named in the will." This being so, the court determined, under the will, circumstances might arise which would prevent alienation and disposition of that interest in the property intended for the daughters for a period beyond lives in being and twenty one years thereafter, and that therefore the provision in relation to such interest should be held to be void. From a consideration of these authorities and the numerous other authorities cited by the respective counsel in their brief, and for other reasons above stated we are irresistibly impelled to hold that the fourth clause of the will of Benjamin F. Johnston should be held to be void, as against the rule forbidding perpetuities.

Appellees raise the question and invoke the rule that the gift of the whole of the interest or income from a legacy vests the principal at the testator's death. They refer us to *Armstrong v. Barber*, supra; *Carter v. Carter*, 234 Ill. 507; and *Kalea's Future Interests*, sec. 213 which are in harmony with this rule. But the implication included in this

THE COURT OF CHANCERY, IN THE MATTER OF THE ESTATE OF JAMES H. HARRIS, DECEASED.

REPORT OF THE COMMISSIONERS OF THE LAND OFFICE, IN RESPONSE TO A RESOLUTION OF THE SENATE, PASSED MAY 1, 1890, RELATIVE TO THE LANDS BELONGING TO THE ESTATE OF JAMES H. HARRIS, DECEASED.

ALBANY: J. B. LEECH, STATE PRINTER, 1891.

general rule should properly be held to prevail only where there was an absolute gift of the income and no clear intention manifest of a grant of the body or corpus of the fund over in other directions under certain conditions. The rule is thus stated in Underhill on the Law of Wills Vol. 5 sec. 685 "But the rule that a gift of the interest of the fund or of the income of the land is a gift of the fund or of the land itself, is only applicable if the testator has not expressly or by implication disposed of the corpus in some other way. The presumption that he intended the legatee of the income to take the corpus by giving him the interest, is not conclusive and may be ~~absolutely~~ rebutted by evidence appearing on the will. Thus, if the testator, after giving the income or issues and profits of land to one for life, provides that, on his death it shall go to others or if, giving the income in fee he devises it over on the contingency of the death of the devisee without issue, the presumption is overcome." It would seem that the rule declaring a gift of the whole interest or income from a legacy to be a vesting of the principal at the testator's death does not in principle have application to a gift of personality where the gift is contained in an express direction to pay at a future time and is contingent upon the legatee surviving that time. The presumption in favor of vesting falls entirely when the testator has expressly declared that the legacy is to go over in case of the death of the legatee before a particular period. 2nd Underhill on Law of Wills sec. 873; 2nd Redfield on Wills 3rd Ed. sec. 233.

The next question for our consideration is whether

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clause four being declared void, the rest of the will must fail with it or whether notwithstanding the invalidity of this clause the remainder of the will as a whole can be enforced. The rule of construction is that parts of a will which are valid will be sustained where no violence is thereby done to the general intention of the testator but that void provisions of the will will be rejected with the invalid ones where the retention of these would plainly defeat the testator's wishes as evidenced by the general intent manifested by him in making his will, or where manifest injustice would result to the beneficiaries by the enforcement of the balance of the will after the rejection of the invalid part. In *Barrett v. Barrett* 355 Ill. 358, this question is considered at some length and cases bearing upon it are discussed and the conclusion there reached by the court, was announced as follows: "The principle is well established that where several trusts are created by will which are independent of each other and each is complete within itself, some of which are lawful and others unlawful, and which may be separated from each other, the illegal trusts may be cut out of the will and the legal ones permitted to stand. There is, however, a well recognized limitation in all the reported cases and by the text writers upon upon this rule which is equally well established with the rule, which is, that when some of the trusts in the will are legal and some are illegal, if they are so connected together as to constitute an entire scheme for the disposition of the estate, so that the presumed wishes of the testator would be defeated if one portion were retained and the other portions rejected, or if manifest injustice would result from such construction to the beneficiaries or to some

The rule of construction is that the words of a statute are to be construed in their plain and ordinary meaning, unless the context clearly indicates otherwise. The rule is applied in the case of the statute in question, and it is found that the words of the statute are to be construed in their plain and ordinary meaning. The rule is applied in the case of the statute in question, and it is found that the words of the statute are to be construed in their plain and ordinary meaning.

of them, then all the trusts must be construed together and all must stand or all must fall." In *Reid v. Voorhees*, *supra*, the rule is stated as follows: "Where the provisions of a will are in fact independent and not for the carrying out of a common or general purpose, it is undoubtedly true that such as are contrary to law may be rejected without in any manner affecting valid provisions. The statement, however, that a valid provision will be sustained if no violence is done to the parts sustained by the rejection of the invalid provisions, is too narrow a statement of the rule, and is in disregard of the cardinal principle that the testator's wishes, as evidenced by the general scheme adopted, are to be taken into consideration, so that justice may be done if it can be

The correct solution can only be arrived at by taking into consideration the general scheme and intention of the testator, and the effect that defeating a part of the provisions may have upon the general scheme of the testator or on the beneficiaries or objects of his bounty." The rules of construction appear to be reasonably clear and plain but the question is how do they apply to the facts in this case. The language of the will and the circumstances surrounding the testator at the time it was executed as above set forth, lead us to believe that his intention was to make substantially an equal division in value of his property between his widow and his two children. This presumption seems to have been substantially accomplished although it would appear that the portion given to the wife, life interests being considered, was hardly so valuable as the portion given to each of the children. Had this suit been brought and the fourth clause of the will declared invalid before the death of either

of them, then all the power shall be transferred to the
the rule is stated as follows: "After the provisions of
will be in fact independent and not the property of the
a common or general law, it is understood that the
it is contrary to the law as proposed without in any way
affecting valid provisions. The provisions, however, of the
valid provision will be considered as in violation of the
the parties concerned by the agreement and the law of the
laws, in fact within a reasonable time, the law of the
right of the will. The provisions of the law of the
as indicated by the words of the law, and the law of the
into consideration, so that the law of the land is to be
The provisions of the law of the land are to be
law of the land, and the law of the land is to be
of the law, and the law of the land is to be
provisions of the law of the land, and the law of the land
or on the basis of the law of the land. The law
it is considered that the law of the land is to be
the question is how to apply the law of the land in this case.
The language of the will and the provisions of the law
The testator is the only one who is to be
least he is believed to be the testator and the law of the land
shall be applied in view of the fact that the testator is the
will and the law of the land. This provision is to be
been automatically incorporated therein it would be a matter of
the portion given to the wife, the law of the land is to be
only was hardly as valuable as the portion given to the wife
the will. The law of the land is to be applied in this case.

of the testator's children, then the trust fund of \$200,000. provided for thereby would, under the residuary clause of the will, have been divided equally between the widow and the two children. This might have given the widow an amount somewhat larger than each child would receive, but the difference in value would not have been considerable enough to have done violence to the intention of the testator as shown by the general scheme of his will nor have resulted in injustice to the children. Especially is this so when it is considered that at the time of the testator's death, the widow was in her fifty third year and that a considerable portion of the provision made for her was by way of life estates in properties, the fee in which was vested in the children. Nor does it appear to us that any different conclusion could be reached upon this subject or different result arrived at, because the bill in this case was not filed until after the death of both of the testator's children. It follows from ^{above} what is said, that while the fourth clause of the will in question must be held invalid, the remaining provisions thereof should be sustained and the fund in question distributed under the fifth or residuary clause.

~~Question is raised whether the will is valid and whether the fund in this case. That is, the fund is to be distributed to the various parties to the estate in this case, the following amounts:~~ To the solicitors for complainant Joseph M. O'Hare \$4000. To the solicitors for the infant complainant, Mary Hazel O'Hare, \$2050. To solicitors for the trustee, the St. Louis Union Trust Company, \$2050 and to solicitors for the defendant, Mary E. Johnston, \$2050.

Walter E. Johnston, \$2000, making a total of \$15,000 and this amount, together with the other costs of the suit, were ordered to be paid by the trustees out of the funds in the trust estate. ~~Substantially the only thing in issue~~ All the parties were interested in having determined, was the question of the validity of the fourth clause of the will, although other matters were involved which affected certain of the parties and it would seem that the amount of \$15,000 allowed against the trust fund for determining whether the clause creating it was valid or not, was an extremely liberal allowance.

As before stated, the principal question was the only one in which all the parties appear to be interested, was as to the validity of the fourth clause of the will. Solicitors, who directed their efforts to sustaining this portion of the will were allowed by the court, fees to the amount of \$8,000.00, while solicitors on the other side, who sought to have this clause held invalid, were only allowed \$1,000.00. It would thus appear that the amount allowed to the solicitors defending the will, was out of all proportion to the amount allowed the solicitors on the other side, and such allowance, must to some extent at least, be deemed excessive. By stipulation of all the parties, filed at the commencement of the suit, it was agreed that solicitors for the Trust Company, should be paid a reasonable sum for the services rendered by them to the Trust Company in the suit to be allowed by the court, taxed as costs and paid as the other costs in the suit. It also appeared that the interest of appellant Joseph H. O'Hare was to some extent covered to that of his daughter, the late Mary Hazel O'Hare and it was therefore proper that the

William E. Johnson, 1900, a man of 40, was a
-count, to attend the trial of the man who
-was to be held by the British in the town of
-estate. SUBSTITUTIONALLY, the man was to be
-the one interested in the trial of the man who
-the validity of the fourth clause of the 1911
-of which have involved which the man was to be
-the man it would seem that the man was to be
-against the man for the man who was to be
-being to a man who was to be held in the town
-is before the man, the man who was to be
-only one in which the man was to be held in the town
-to the validity of the fourth clause of the 1911
-there, no direct effort to establish the man
-of the man who was to be held in the town
-in, 1900, the man who was to be held in the town
-was to be held in the town, the man who was to be
-to be held in the town, the man who was to be
-defending the man, the man who was to be
-the man who was to be held in the town, the man
-must be some other of the man, the man who was to be
-mission of all the man, the man who was to be
-only, the man who was to be held in the town, the man
-should be held in the town, the man who was to be
-this is the man who was to be held in the town, the man
-man, the man who was to be held in the town, the man
-to the man who was to be held in the town, the man
-the man who was to be held in the town, the man
-the man who was to be held in the town, the man

letter should have a guardian ad litem to defend her interests and that his fees should be allowed as part of the costs. The question then arises as to the allowance of fees to the solicitors for the other parties. As a general rule where a testator has in his will expressed his intentions so unequivocally as to create an uncertainty as to his intention, making it necessary to come into a court to obtain a construction of the will the costs of the litigation, including solicitors' fees, must be borne by the estate, *Missionary Society v. Mead* 131 Ill. 338. *Ingraham v. Ingraham*, supra. Under this rule we think it was also proper to allow solicitors' fees to counsel representing Joseph H. O'Hare in person and as administrator of the estate of Hazel E. O'Hare, deceased and also to counsel representing the appellants. Mr. Hugh V. Murray, one of the solicitors for Mr. O'Hare, testified as to the value of the services rendered by counsel to Mr. O'Hare and stated in fixing them he took into consideration the fact that on the main question they were successful and a number of other witnesses called in that behalf testified that in fixing the amount of fees to which Mr. Murray and his associates should be entitled, they also took into account the fact that such counsel had been successful in the case. In view of the fact that the decree in this case is reversed and the contentions of appellees concerning the validity of the clauses of the will in question, have not been upheld, it is evident that that portion of the fee determined as being proper for the solicitors for Mr. O'Hare, which was based upon their success in the suit cannot be sustained and that a smaller amount should be allowed. As to the amounts fixed as proper

for the other solicitors as above set forth, while they are
all large, yet in view of the rule that the master allows
by the court to the various parties to a bill to estimate a
bill for their solicitors' fees, is generally a matter of
discretion with the chancellor trying the case, we cannot
say that the amounts named here, except as to the amount al-
lowed Mr. O'Hare for his solicitors' fees, are so excessive
as to demand a revision by this court. We are also of opin-
ion that under the circumstances of this case, it is proper
that the solicitors' fees should be paid by the trustee out
of the trust fund in his hands as was directed by the court
below, instead of out of the general funds of the estate.

The decree will be reversed and the cause remanded
that a decree may be entered by the court below in conform-
ity with the views herein expressed.

Reversed and remanded.

(Not to be reported in full.)

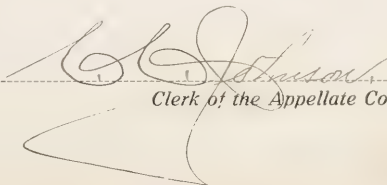
for the other solicitors to come and look at the bill. It is not
fair to say, yet in view of the fact that the bill is not
by the court to the solicitors to be all to consider
and the fact that the bill is not to be all to consider
the fact that the bill is not to be all to consider
say that the accounts need not, except as to the bill to
be paid by the solicitors, but as to the bill to be paid
as to the bill to be paid by the solicitors, it is not
for that under the circumstances of the case, it is not
that the solicitors' fees should be paid by the court
at the first trial in this case as was discussed by the court
below, instead of out of the pocket of the parties.
The court will be satisfied of the amount of the
bill to be paid by the court to be paid in order
with the bill to be paid by the court to be paid.

RECEIVED

(Not to be reported in full.)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

1941A156

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Hurris, Presiding Justice.

✓ Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 156

ERROR TO
APPEAL FROM

E. J. Topp

vs.

No.

20

October Term, 1914.

Circuit COURT

Laurence COUNTY

C. J. DuPont
D. C. Newman Powder Co.

TRIAL JUDGE

HON.

C. C. Newman

-October Term, 1914.

H. J. Hopple,

Appellant,

vs.

Appeal from Lawrence.

E. I. DuPont DeNemours
Powder Company,

Appellee.

Opinion by Higbee, J.

By this appeal appellant seeks to reverse a judgment of the circuit court of Lawrence county against him, rendered ^{in a suit} in assumpsit brought by him against appellee, to recover \$1,300.00 for work and labor claimed to have been performed in cleaning out an oil well after it had been ^{the} shut in. ^{from a judgment in favor of the defendant} The declaration contained the common counts with a bill of particulars, showing the number of hours labor performed by appellant and certain expenses incurred in the performance of such work. The grounds relied upon by appellant for reversing the judgment are, that the verdict was not sustained by the evidence and that the court erred in the admission of certain evidence and in its rulings upon the legal questions.

The following facts were developed by the proofs:

In the fall of 1911, appellant, the president and stockholder of the Morrison Oil Company, a domestic corporation, was employed by said company to drill and deepen an oil well for it on land leased by the company from George F. McNamee in Lawrence county, Illinois. After the well was drilled down from 1625 to 1675 feet, oil was found, and appellee was employed to shoot the well to break up the oil sand and increase the pro-

October Term, 1914.

Appeal from Lawrence.

H. J. Noble,
Appellant,
vs.
E. I. DuPont De Nemours
Toledo Company,
Appellee.

Opinion by Hibbs, J.

By this appeal appellant seeks to reverse a judgment of the circuit court of Lawrence county against him, rendered in a suit in assumpsit brought by him against appellee, to recover \$1,000.00 for rent and labor claimed to have been performed in cleaning out an oil well after it had been abandoned. The grounds relied upon by appellant for reversal are, that the verdict was not sustained by the evidence and that the court erred in the admission of certain evidence and in its rulings upon the instructions. The following facts were developed by the proofs:

In the fall of 1911, appellant, the president and sole owner of the Morrison Oil Company, a domestic corporation, was employed by said company to drill and deepen an oil well on land leased by the company from George W. Kottel in Lawrence county, Illinois. After the well was drilled down from 1025 to 1075 feet, oil was found, and appellee was employed to shoot the well to first-class oil sand and increase the pro-

section of oil. Appellee accordingly, on November 17, 1914,
put in the well a shot consisting of 120 quarts of nitro gly-
cerine, the material being placed in six tin containers each
seven feet and two inches long. On the bottom of the first
shell or container was placed ~~what is known as~~ an anchor, 12
inches in length so that the anchors and the six containers
when placed in order, extend a distance of 43 feet from the
bottom of the well. On the following morning appellant's
driller cleaned the oil from the well and about noon the agent
of appellee prepared to fire the shot by means of a shot
known as a "jack-squib." The jack-squib consisted of a tin
container some 5 or 6 inches in length and 2 1/2 inches in di-
ameter, tapering to a point at the lower end, in which were
placed two sticks of dynamite and some sand and to which was
attached a cap and fuse. This cap was lighted and dropped
When the shot was dropped
in the well, and shortly afterwards there was a noise in the
well and the casing jumped up 5 or 6 inches. After this ap-
pellant's workmen pulled the casing *was pulled up* and found it had been shot
and found to have
off about 93 feet above the bottom of the well, or 49 feet
from the top of the shot.

He *claimed that he*
Witnesses for appellant testified that he, released
to proceed to clean out the well until he should be ordered to
do so, and that the next day appellee's agent, Meeker, came to
the well with another one of its employees and after examining
the pipe and considering the question of cleaning out the well,
said to an employee of appellant in charge of his tools at the
well, *that* "The job is on us, go ahead and do as Mr. Hopple says,
as he knows more about it than I do"; *that* this was communicat-
ed to appellant, who then put his men to work cleaning out the

[illegible]

well and that they were employed in the work some twenty-four days in all. There was also evidence introduced on behalf of appellant tending to show that Meeker told persons on different occasions that he had employed appellant to clean out the well.

On the other hand Mr. Meeker and others on the part of appellee, denied these statements and it was shown by the testimony of appellee's witnesses that appellant presented a bill for services on the well to appellee in February, 1912, which was not paid; that afterwards on March 7, 1912, appellant met with Broadwater, appellee's general manager, and Meeker, at the store of the Illinois National Sugar Company in Bridgeport, Illinois, where appellant lived and had a conversation with him about the well, and said bill rendered by appellant to appellee; that in the course of the conversation it was agreed, that when the weather got warmer, appellant should go ahead with the work of cleaning out the well and if it should be ascertained that the shot put in the well by appellee, had been exploded then the appellee would owe nothing to appellant for his work; but if on the contrary it should be found that the shot had not been exploded, appellee would settle with appellant for the work done by him in cleaning out the well; and it was further agreed that when work was resumed on the well, appellee should be notified thereof and that one of its employees could be present during the continuance thereof. Subsequently the work on the well was resumed, appellee notified and an employee was sent to represent it at the well. After some work had been done however, and before the well was sufficiently cleared out for it to be determined whether or

well and that they were employed in the ... days in all. There was also evidence ... appellant tending to show that ... appellant to show that he had employed appellant to clear out the

well.

On the other hand Mr. ... appellant, denied these statements and it was shown by the testimony of appellant's witness that appellant provided a bill for services on the well to appellant in February, 1911, which was not paid; that afterwards on March 7, 1911, appellant and his brother, appellant's brother, ... as the owner of the Illinois ... in Bridgeport, Illinois, where appellant lived and was a ... veration with him about the well, and said appellant ... appellant to appellant; that in the course of the conversation it was agreed, that when the weather got warmer, appellant should go ahead with the work of clearing out the well and it should be ascertained that the shot put in the well by appellant, had been exploded then the appellant would not be holding to appellant for his work; but if on the contrary it should be found that the shot had not been exploded, appellant would settle with appellant for the work done by him in clearing out the well; and it was further agreed that the work on the well, appellant should be notified ... of its employees could be present during the continuance thereof. Subsequently the work on the well was resumed, appellant notified and an employee was sent to represent it at the well. After some work had been done however, and before the well was sufficiently cleared out for it to be determined whether or

not the shot had been exploded, appellant abandoned the work without the knowledge of appellee and brought this suit.

The claim of appellant, was that he had been employed by appellee after the injury to the well and casing to go ahead and clean out the well, with the promise that appellee would pay for such work, while the claim of the appellee was that appellant should continue his work of cleaning out the well and the question of payment depended on whether or not it should be found that the shot put in the well by appellee had been exploded, if it should prove not to have been exploded appellee should pay for the work, but if it was shown to have been exploded, he should not. Appellee claims that the proofs show that the shot had in fact been fired and the circumstances testified to seem to sustain that claim.

The burden of showing a right of recovery was upon appellant but the proofs concerning the conflicting claims of the two parties, were such that it would be difficult indeed to determine which side had the preponderance in its favor, and under such circumstances it is but natural and proper that the jury should find in favor of the appellee which had no such burden to carry and the verdict so found should not be disturbed. It is complained by appellant that evidence was admitted over his objections as to the manner of shooting wells and whether this well was really shot, that is whether the shot put in the well was exploded. The question however, of whether the well mentioned in the controversy was shot or not was one directly involved by the issues and proofs in the case. A witness for appellant who was present when the well was shot, was permitted to state that he told appellee's agent he did not believe the shot went off and the agent re-

plied he did not either, and it was proper that appellee should be permitted to introduce evidence as to the nature of shooting wells and as to whether this well was in fact shot, to meet the evidence on this subject of appellant. Appellant also objected to the admission of testimony on behalf of appellee showing that the latter held a claim against the Morrison Oil Company of which appellant was president. The question of accounts between appellee and the Morrison Oil Company was of course not a matter to be adjusted in this suit but appellant sought to show that appellee's agent made an appointment with him to settle with him and appellee, while admitting the appointment said that it was not to settle with him for the cleaning of the well but for the purpose of effecting a settlement with him for the account of the Morrison Oil Company and for this purpose the evidence was competent.

Appellant's criticism of the court in regard to the instructions is that the court improperly refused four of appellant's instructions and erred in giving instructions NO. 7 and 17 for appellee. The first and second of appellant's refused instructions, were fully covered by other instructions given by the court in his behalf. Appellant's refused instruction No. 3 stated, that a custom to be binding must be general and uniform in the place where it is claimed to exist, but there was no proof of the existence of any custom which affected the issues in this case and therefore the instruction was properly refused. Instruction No. 4 refused for appellant, was general in its terms and was not applied to the facts in the case and there was therefore no error in refusing it. Instru-

... he did not object, and it was proper that the evidence should be permitted to introduce evidence as to the manner of shooting wells and as to whether this well was in fact shot, to meet the evidence on this subject of appellant. Appellant also objected to the admission of testimony on behalf of appellee showing that the latter had a claim against the Morrison Oil Company of which appellant was president. The question of accounts between appellee and the Morrison Oil Company, as of course not a matter to be adjudicated in this case, but appellant sought to show that appellee's claim against appellant with him to settle with him and appellee, this was stating the appointment said that it was not to settle with him for the cleaning of the well but for the purpose of settling a indebtedness with him for the services of the Morrison Oil Company and for this purpose the evidence was competent. Appellant's criticism of the court in regard to the instructions is that the court improperly refused to give appellant's instructions and erred in giving instructions No. 3 and 4 for appellee. The first and second of appellant's proposed instructions, were fully covered by the instructions given by the court in his behalf. Appellant's refusal instruction No. 3 stated, that a custom to be binding must be general and uniform in the place where it is claimed to exist, but there was no proof of the existence of any custom which affected the issues in this case and therefore the instruction was properly refused. Instruction No. 4 refused for appellant, was general in its terms and was not applied to the facts in this case and there was therefore no error in refusing it. Instruction

tion No. 7 given for appellee was concerned with the question of its employment to shoot the well and stated that in regard to his obligations in case the injury to the well was not occasioned by the negligence of appellee. While this statement of the instruction was unnecessary, there was nothing in it that prejudiced appellant's right and following this declaration the instruction stated the law applicable to the issues in the case. Appellee's instruction No. 17 set forth the contract and facts as claimed to exist by appellee upon which it based its defense and told the jury, that if they believed the same to exist from a preponderance of the evidence, they should find in favor of appellee. This instruction was correct and was properly given by the court.

No sufficient reason appears in the record why this judgment should be reversed and the same is therefore affirmed.

Judgment Affirmed.

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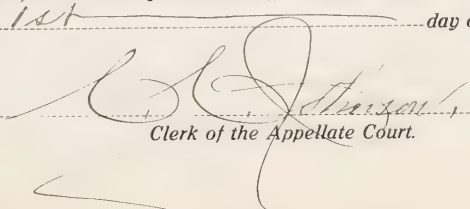
(Not to be reported in full.)

from 10. 7. 1947. The witness was concerned with the ques-
tion of its employment to shoot the well and stated the
in regard to his obligations in case the well was
was not considered by the defendant as a witness. The
statement of the instruction was unnecessary, there is no
thing in it that would prevent the witness from being
this declaration the instruction stated the law applicable to
the issues in the case. The witness's instruction No. 14 was
forth the contract and there was claimed to exist by the
upon which it based its defense and told the jury, that if
they believed the same to exist from a preponderance of the
evidence, they should find in favor of the defendant. This in-
struction was correct and was properly given by the court.
No sufficient reason appears in the record why this
judgment should be reversed and the case is therefore affirmed.

(Not to be reported in local.)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

INION

747

94 A 166

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 166

F. L. & C. Tel. Assn.

ERROR TO
APPEAL FROM

vs.

No. 26

October Term, 1914.

Circuit

COURT

Jackson

COUNTY

D. & M. Valley Tel. Co.

TRIAL JUDGE

HON. A. W. Lewis

October Term, 1911.

Farmers' League and Community
Telephone Association, a Cor-
poration,

vs.

Appellee,

Ohio and Mississippi Valley
Telephone Company, a Corpor-
ation,

Appellant.

Appeal from Jackson.

Opinion by Higbee, J.

The Farmers' League and Community Telephone Association brought suit in assumpsit against the Ohio and Mississippi Valley Telephone Company, to recover damages for breach of a contract between them dated April 30, 1909, and set out in full in the declaration. In the trial court the plaintiff association recovered a judgment for \$3,000.00 against the defendant and the latter has brought the case here by appeal. The contract provided that appellant in consideration of the rental and toll derived from subscribers to the Carbondale and Marion, Illinois, exchange service of appellee and certain additional considerations later set forth in the contract, would operate appellee's telephone exchange plant then in operation in Carbondale and Marion for a term of fifteen years from May 1, 1909; that by the term exchange plant in each of said cities was meant "all outside exchange poles, cables, wires, cross arms, fixtures and appurtenances and the central office equipment including switch boards, cables, protectors, distributing racks, office furniture, fixtures and appurtenances;" that appellant would furnish free

October 1911.

The Yarners' League and Community Telephone Association, a Corporation,
 Plaintiff,
 vs.
 Ohio and Mississippi Valley Telephone Company, a Corporation,
 Defendant.

Complaint by Plaintiff.

The Yarners' League and Community Telephone Association brought suit in December against the Ohio and Mississippi Valley Telephone Company, to recover damages for breach of a contract between them dated April 25, 1909, and set out in full in the declaration. In the said contract plaintiff association recovered a judgment for \$3,000.00 against the defendant and the latter has brought the same here by appeal. The contract provided that plaintiff in consideration of the sum of ten dollars and half cents per month to the Ohio and Mississippi Telephone Company, should receive the right to use the Ohio and Mississippi Telephone Company's lines and equipment for the purpose of operating in Cincinnati and Marion for a term of fifteen years from May 1, 1909, that by the said contract plaintiff in each of said cities and towns "all outside exchanges, cables, wires, poles and other equipment, including switchboards, and the central office equipment including switchboards, lines, protectors, distributing frames, office furniture, etc., and all other equipment" that defendant would furnish for

of service through its exchanges, 2-0 telephones in the city of Carbondale and one to the city of Marion as required by the franchises granted by said cities respectively, said phones being located where the several city councils should designate; that appellant would also furnish the free use of all of its lines to the bona fide subscribers to the system service over all lines owned or controlled by appellee and in addition would give to subscribers in Jackson county connected with appellee's Carbondale exchange free use of all lines owned or controlled by appellant in said county and in like manner would give free use to appellee's subscribers of the local lines owned or controlled by appellant in Williamson county connected with appellant's Marion exchange. It was further agreed that appellee's lines not ringing direct to the Carbondale switch board, should have free use of appellant's local lines in Jackson county or lines connected therewith; and that those in Williamson county not ringing direct with the switch board at Marion, should have free use of appellant's local lines and connections in that county, that in like manner appellee's subscribers in Union county should have free use of appellant's lines and connections in that county not calling through the switch board at Anna, but that such free use above provided for should not extend beyond the county lines. It was further agreed that when five or more of appellee's subscribers should build a line with five or more telephones connected therewith to the corporate limits of either of the three cities above named, appellant would connect said line with the central office of the city so connected with free of charge and that the rate to be paid for

of the lines, the exchanges, the telephone to the city of Marion as required by the franchise granted by said cities respectively, and the lines being located there the several city councils should be notified; that applicant could also furnish the lines of all of the lines to the same line subscribers to the city of Marion over all lines which are controlled by applicant and in which applicant's Garrettsville exchange is one of all lines owned or controlled by applicant in said county and in which applicant could give free use to applicant's subscribers of the local lines owned or controlled by applicant in said county. It was further agreed that applicant's lines not running direct to the Garrettsville switch board, should have free use of applicant's local lines in Jackson county or lines connected therewith; and that those in Williamson county not running direct to the switch board at Marion, should have free use of applicant's local lines and connections in that county; and in the manner applicant's subscribers in Union county should have free use of applicant's lines and connections in that county not calling through the switch board at Marion, and that such free use above provided for should not extend beyond the county lines. It was further agreed that when five or more of applicant's subscribers should build a line - the five or six telephone connections thereto at the switch board at Marion of either of the three cities above named, applicant would not call said line with the central office of the city so connected with lines of charge and that the rate to be paid for

appellant by said subscribers for each of the telephones so connected, would be fifty cents per month; that appellee would connect all lines then existing within the corporate limits of Carbondale and within the corporate limits of Marion and make all connections with the telephones of appellee's bona fide subscribers and make all reports to the local exchange plants in said cities, meaning thereby all outside exchange poles, cables, wires, cross arms, poles, fixtures and appurtenances, the central office equipment, including switch boards, cables, cable protectors, distributing racks, office furniture and fixtures and appurtenances so as to keep the same in good condition, but that nothing in the agreement should be construed as an obligation on the part of appellant to clear trouble on or maintain any part of the plants outside of the corporate limits of said cities; that when a bona fide subscriber of appellee for a period of one year should move from the country to Carbondale or Marion he should become as the other subscribers within the corporate limits of said cities and receive the same benefits; that appellant should furnish appellee's subscribers service during the life of the contract at the same rate that was enforced at the time the contract was entered into and of the same standard of quality and that appellant should pay the taxes on said telephone property of appellee now located in the corporate limits of said cities of Carbondale and Marion. It was further agreed that in case appellant failed to carry out any of the covenants of the agreement, appellee might enter upon and take possession of the property covered thereby and that appellee should

...in this connection for one of the following reasons: ...
...shall be considered as an obligation on the part of applicant
to clear title on or within any part of the lands within
of the corporate limits of said cities; that when a person is
adversely affected for a period of one year or more by
from the county to Oklahoma or before he should be
the other subscribers within the corporate limits of said
cities and receive the same benefits; that applicant should
within applicant's subscribers service during the life of the
contract at the same rate that are entered at the time the
contract was entered into and of the same character of quality
and that applicant should pay the taxes on said telephone
property of applicant not located in the corporate limits of
said cities of Oklahoma and Marion. It is further agreed
that in case applicant failed to carry out any of the conditions
of the present, applicant shall enter into and pay taxes
upon of the property covered thereby and that applicant should

not sell any additional shares of stock in Carbondale and Marion, also that the agreement so far as it applied to Carbondale and Marion included only the present bona fide subscribers therein and did not admit of any additional local subscribers being connected and enjoying the benefits provided for by the agreement.

The declaration averred that appellee had well and truly performed and fulfilled all its part of the agreement mentioned in said contract to be done and performed by it but that appellant had not performed its part of the contract, the breaches assigned being that it had neglected and refused to furnish subscribers of appellee service of the same standard of quality as those furnished subscribers of appellant, that it discriminated against subscribers of appellee; that it had failed to connect five subscribers of appellee who had constructed a line to the corporate limits of the city of Anna; that it neglected and refused to give subscribers of appellee free service to all subscribers in Jackson county not ringing direct to the Carbondale switch board and the same averment was made with reference to subscribers in Williamson and Union counties not ringing directly to the Marion and Anna switch boards; that it failed to connect with all lines of appellee existing at the date of the contract within the corporate limits of Carbondale and thereby deprived subscribers of appellee with connections from within the city of Carbondale to Makanda and elsewhere; that it had refused and neglected to make reports of the exchanges and plants of appellee within the cities of Carbondale and Marion and had allowed

[illegible]

appellee's poles and wires to become out of repair, rot and decay thereby depriving appellee and its subscribers of telephone connections from the city of Carbondale to other points in Jackson county and that Appellant had otherwise failed to keep and observe its contract; that by reason of the neglect aforesaid on the part of appellant, the property and good will of appellee had been damaged and it had been hindered and prevented from getting new subscribers and from selling its shares of stock outside of the cities of Carbondale and Marion.

Appellant pleaded the general issue and four additional pleas, the first additional plea alleged that one of the principal considerations leading appellant to enter into the contract was that appellee agreed to make appellant a valid lease of its telephone exchange plant in the city of Carbondale which it had failed to do. The second averred that the ordinances of said city, granting the franchise to appellee for its telephone plant, provided that the same could only be transferred by the payment of \$8,000.00 to the city; that appellee did not pay said sum and therefore said contract was void. The third stated that appellee represented it was the owner of the telephone exchange plant in the city of Marion mentioned in the contract and had full right to lease the same to appellant and would defend the same against all incumbrances and liens and current peaceable possession thereof; but that the switch board at such place had been seized by the sheriff of the county by virtue of an execution against appellee since which time such switch board had not been in the possession of appellant; that a large number of other articles and equipment comprising said exchange had also been

appellee's sales and then to dispose of property, not to
deceit thereby depriving appellee of its ownership of said
property, connections from the city of Garrettsville to other
in between county and that appellee had otherwise failed to
keep and observe its contract; that by reason of the failure
of appellee to the part of its contract, the property and goods
of appellee had been damaged and it had been obliged to pay
damages from selling its goods and the selling its shares
of stock outside of the city of Garrettsville and Marion.

Appellant also had the general issue and that
in the first class, the first additional class offered in the
the principal consideration leading appellee to enter into
the contract was that appellee agreed to the appellee's
to issue of the telephone exchange plant in the city of Gar-
rettsville which it had failed to do. The second averment was
the ordinance of said city, granting the franchise to ap-
pellee for its telephone plant, provided that the same would not
be transferred by the payment of \$5,000.00 to the city; and
appellee did not pay said sum and therefore said contract was
void. The third stated that appellee represented to the
owner of the telephone exchange plant in the city of Marion
that it was in the contract and had full right to lease the
same to appellee and would defend the same against all in-
fringements and claims and would protect appellee's interest there-
in and that the said board at such place had been seized by
the sheriff of the county of Marion of an execution against
appellee since which time such writ had not been in-
the possession of appellee; that a large number of other in-
terests and equipment connected with appellee had also been

seized under execution and that appellant had been forced to pay the sum of \$500.00 to settle liens and incumbrances against said property. The fourth was a plea of nul tiel corporation. To each of these additional pleas a demurrer was filed by appellee, which was sustained by the court and appellant thereupon elected to abide by its pleas. A large volume of evidence was taken in this case upon the question whether appellant had failed to do and perform those things required of it by the provisions of the contract and upon this question there was a sharp controversy in the evidence. We will however not discuss the question of the weight of the evidence in this opinion as the judgment must be reversed upon other grounds.

The first question to be considered is the action of the court in sustaining the demurrers to the special pleas. We are of opinion that the court properly sustained the demurrer to appellant's plea of nul tiel corporation for the reason that, as it had entered into the contract with appellee as a corporation, it could not, after entering into said contract and transacting business with it in that capacity, now be heard to deny its corporate existence. (Winget v. Quincy Bldg. Assn., 128 Ill., 57 and other authorities therein cited.) The matters of defense set out in the other additional pleas however, while not in any one plea presenting a bar to the action, yet present, if their charges could have been proven, such a failure on the part of appellee to comply with some provision of the contract which it had undertaken to perform and appellant had a right to the benefit of the same in mitigation of any damages which might be awarded against it. It is contended by appellee that the facts set up in these pleas

against water circulation and that appellant had been forced to
pay the sum of \$500.00 to settle liens and encumbrances on land
with property. The fourth was a plea of null and void.
To each of these additional pleas a demurrer was filed by the
appellee, which was sustained by the court and appellant there-
upon elected to abide by its plea. A large volume of evi-
dence was taken in this case upon the question whether or not
the appellee failed to do and perform those things required of it
by the provisions of the contract and upon this question there
was a sharp controversy in the evidence. We will however not
discuss the question of the weight of the evidence in this
opinion as the judgment must be reversed upon other grounds.
The first question to be considered is the motion
of the court in sustaining the demurrer to the second plea.
We are of opinion that the court properly sustained the de-
murrer to appellant's plea of null and void corporation for the
reason that, as it had entered into the contract, it was
liable as a corporation, it could not, after entering into the
contract and transacting business with it in that capacity,
not be held to have its corporate existence terminated.
(See, also, 123 Ill. 67 and other authorities therein cited.)
The matters of defense set out in the other additional pleas
however, while not in any one plea presenting a bar to the
action, yet present, if their charges could have been proven,
such a failure on the part of appellee to comply with some
provision of the contract which it had undertaken to perform
and appellant had a right to the benefit of the same in its
action of any damages which might be awarded against it. It
is contended by appellee that the facts set out in these

was outside of the written contract and if allowed to be shown would have amounted to an alteration or change of the written contract by parole which could not have been done. Such does not seem to us to be the true effect of the pleas. They appear to recognize the contract as such but state as matters of partial defense facts which could have only arisen since the contract was entered into showing that appellee had failed to keep and perform several material provisions of the same. Nor does the fact that these pleas do not severally or collectively constitute a bar to the entire cause of action, seem to render them subject to demurrer under the circumstances of this case. It is true that a partial reduction of damages by way of recoupment cannot, as a general rule, be shown under a special plea in bar, but may be taken advantage of to reduce the damages claimed by the plaintiff under the general issue. *Wadhams vs. Swan*, 108 Ill., 46. Section 9 of chap. 98 of our Statutes, provides that, "In any action upon a note, bond, bill or other instrument of writing for the payment of money or property or the performance of covenants or conditions, if such instrument was made or entered into, without a good and valuable consideration or if the consideration upon which it was made or entered into, has wholly or in part failed, it shall be lawful for the defendant to plead such want of consideration or that the consideration has wholly or in part failed; and if it shall appear that such instrument was made or entered into without a good or valuable consideration or that the consideration had wholly failed, the verdict shall be for the defendant; and if it shall appear that the consideration has failed in part, the plaintiff shall

The court held that the contract was voidable at the option of the plaintiff because it was made under duress. The defendant argued that the contract was enforceable because it was supported by consideration. The court found in favor of the plaintiff.

recover according to the equity of the case.* Under this statute, if not otherwise, the first, second and third additional pleas presented by appellant, were proper and the court erred in sustaining the demurrers to them.

Appellant complains of six of the instructions given on the part of appellee because they failed to provide as a requisite to the right of recovery on the part of appellee that it make proof of a compliance with the contract on its part, and also ignored the contention of appellant, that it had been damaged by the failure of appellee to carry out portions of its contract. Some of these instructions informed the jury as to the conditions which would authorize a verdict for appellee and that right is based solely therein upon the question of the failure of appellant to perform its part of the contract without reference to anything required to be done therein by appellee thus ignoring the claims of appellant, in mitigation of damages, which he was seeking to establish. "If an instruction directs a verdict for either party or amounts to such a direction in case the jury shall find certain facts, it must necessarily contain all the facts which will authorize the verdict directed." *Pardridge v. Cutter* 188 Ill., 504. We think the giving of these instructions by the court in the form in which they were presented, constituted reversible error in this case, notwithstanding the fact that they do not undertake to instruct the jury upon the whole case but only as to particular parts of the contract. The court also refused an instruction offered by appellant which said to the jury that if they believed appellant did not get the use of the central office equipment of

recover according to the equity of the case." Under this statute, if not otherwise, the first, second and third claims presented by appellants, were rejected and the court erred in sustaining the demurrers to them.

Appellant complains of six of the instructions given on the part of appellee because they failed to require a reversal to the right of recovery on the part of appellants that is made proof of a condition with the contract in the past, and also ignored the condition of appellants, that it had been damaged by the failure of appellee to carry out portions of its contract. So as of these instructions instructed the jury as to the conditions which would entitle a reversal for appellee and that right is a legal liability which the question of the failure of appellee to perform the part of the contract without reference to anything required to be done therein by appellee thus ignoring the claim of appellee, in mitigation of damages, which he was entitled to recover. "If an instruction directs a finding for appellee party or amounts to such a direction in favor of the party then certain facts, if not necessarily enough all the facts shown, it authorizes the verdict directed." *Boyd v. Outer 188 Ill. 2d 504*. "To limit the finding at issue, instructions by the court in the form in which they are presented, constituted reversible error in this case, notwithstanding the fact that they do not authorize the finding for the party on the whole case but only as to portions of the case." *Boyd v. Outer*. The court also refused an instruction offered by appellants which was to the effect that if the appellee failed to perform it did not get the use of the central office equipment of

the appellee, which was in service at Marion at the time the contract was entered into, for the reason it was sold on execution against appellee, and that appellant sustained damages thereby, then the jury had a right to set off such amount of damages as they found, from the evidence appellee had sustained, against the damages they found appellee had sustained by reason of the default of appellant. This instruction correctly stated an element of defense which appellant had a right to have the advantage of upon the trial and the same statement will apply to several other instructions offered by appellant which the court refused to give.

The theory upon which this case was tried appears to have deprived appellant of the benefit of legitimate matters of defense which, had they been properly presented, would no doubt have materially lessened the amount of damages recovered. For the reasons above given the judgment in this case will be reversed and the cause remanded.

Reversed and remanded.

~~CONFIDENTIAL~~

(Not to be reported in full.)

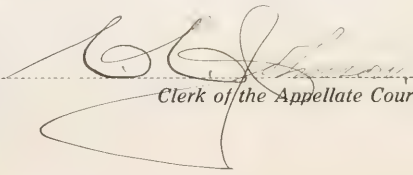
the applicant, which was received at Boston in the late
month of the winter term. For the reason it was not
admission signed applicant, and that applicant was not
admission signed, that the fact is that it was not
of charges as they found, from the evidence presented and
found, against the charges that found applicant had not
by reason of the nature of evidence. This investigation
would be stated as a matter of fact, and it is not
to have the advantage of over the fact in the evidence
will apply to several other instances stated in evidence
which the court would be free.

The finding upon this case was that
to have received evidence of the nature of evidence
case of evidence, which has been properly presented, and
no doubt have materially reduced the amount of charges
covered. For the reasons above given the finding in this
case will be reversed and the cause remanded.

Reversed and remanded.
NOT TO BE REPORTED IN FULL.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

748

74 A 171

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 171

ERROR TO
APPEAL FROM

vs.

No.

30

October Term, 1914.

COURT

COUNTY

Carbondale, Building,
Loan & Trust Association

TRIAL JUDGE

HON.

W. H. Duncan

Term No. 30.

Agenda No. 10.

October Term, 1914.

James Biggs,	}	
Appellee,		
vs.		Appeal from Jackson.
Carbondale Building Loan and Homestead Association,		
Appellant.	}	

Opinion by Higbee, J.

The declaration filed by appellee, James Biggs, was in assumpsit, contained the common counts and one special count. The latter set out that appellant, the Carbondale Building, Loan and Homestead Association, was a corporation, under the laws of Illinois, relating to building, loan and homestead associations; that on January 23, 1910, eighteen shares of stock in said association, were issued to him and on that day he borrowed of said association, the sum of \$1800; that to secure said loan he and his wife executed a note and mortgage to the association on certain real estate and also assigned to it an insurance policy in the "Sun Insurance Office of London", for \$1,500.00, dated August 19, 1903, for a period of three years; that at the time of making said loan appellant had adopted the following by-law, pertaining to insurance policies which was then in force and a part of the contract between appellant and appellee, to wit: "In all cases where fire insurance policies have been transferred to the association, as collateral security for loans and the same are about to expire, the secretary shall notify the borrower,

Chicago, Term, 1914.

Appeal from Jackson.

James H. Higgs, Jr.
vs.
Garibaldi Building Loan and
Homestead Association, Appellant.

Opinion by Higgs, J.

The declaration filed by appellee, James Higgs, Jr. in assumpsit, contained the common counts and one special count. The latter set out that appellant, the Garibaldi Building, Loan and Homestead Association, was a corporation, under the laws of Illinois, relating to building, loan and homestead associations; that on January 23, 1910, eighteen shares of stock in said association, were issued to him and on that day he borrowed of said association, the sum of \$1800; that to secure said loan he and his wife executed a note and mortgage to the association on certain real estate and also assigned to it an insurance policy in the "Sam Insurance Office of London", for \$1,500.00, dated August 19, 1908, for a period of three years; that at the time of making said loan appellant had adopted the following by-law, pertaining to insurance policies which was then in force and a part of the contract between appellant and appellee, to wit: "In all cases where life insurance policies have been transferred to the association, as collateral security for loans and the same are about to expire, the association shall notify the borrower,

and should he or she neglect or refuse to renew the same the secretary shall, without delay, cause a new policy to be issued and shall charge the same to the borrower with his or her next monthly dues, and for each neglect of duty as herein specified, the secretary shall be fined \$5.00"; that in addition to said by-law, appellant had adopted the following rules and regulations upon the same subject; "Borrowers will please keep insurance in force and policy in hands of secretary as provided in mortgages. Policy renewed and in agents hands will not suffice as secretary has no time to hunt up policies, but will hereafter, after giving notice of expiration, cause property to be insured in company of his selection and charge premium to borrower. Failure to pay insurance is cause for foreclosure;" that appellant required said policy should be deposited with it, and by its agent agreed with and promised appellee that at the expiration of the policy on August 19, 1911, appellant would renew and effect insurance on the dwelling house on the mortgaged lot for \$1,500.00; that appellant failed to renew the same or notify appellee of the expiration thereof, and on October 31, 1913, the house was wholly destroyed by fire without fault of appellee; that at the time of the loss of said house, appellee owed a balance to appellant on said note and mortgage, of \$1,186.78; that on account of appellant's failure to reinsure the property as it had promised and agreed to do, it had become indebted to appellee in the sum of \$1,500.00, less the amount of \$1,186.78 due on said note and mortgage as aforesaid, and the cost of procuring said insurance, which would have been \$12.00, leaving a balance due of \$301.22 for which amount suit was brought. Three pleas

and should he or she neglect or refuse to renew the same the
secretary shall, without delay, cause a new policy to be is-
sued and shall change the name to the borrower with his or her
next monthly dues, and for each neglect of duty as herein spe-
cified, the secretary shall be fined \$5.00; that in addition
to said by-law, appellant had adopted the following rules and
regulations upon the same subject: "Borrowers will please keep
instruments in force and policy in hands of secretary as pro-
vided in mortgages. Policy renewed and in agents hands will
not suffice as secretary has no time to hunt up policies, but
will nevertheless, after giving notice of expiration, cause prop-
erty to be insured in company of his selection and charge prem-
ium to borrower. Failure to pay insurance is cause for fore-
closure;" that appellant required said policy should be de-
posited with him, and by the expiration of the policy on August 16,
1911, appellant would renew and effect insurance on the dwell-
ing house on the mortgage and for \$2,500.00; that appellant
told no more the date of expiration of the policy
thereof, and on October 31, 1913, the house was totally destroyed
by fire without fault of appellee; that at the time of the
loss of said house, appellee owed a balance to appellant on
said note and mortgage, of \$1,186.78; that on account of ap-
pellant's failure to reimburse the property as it had promised
and agreed to do, it had become indebted to appellee in the
sum of \$1,500.00, less the amount of \$1,186.78 due on said note
and mortgage as aforesaid, and the cost of procuring said in-
surance, which would have been \$12.00, leaving a balance due
of \$301.22 for which amount suit was brought. These facts

were filed by appellant to the declaration, the general issue, statute of frauds and ultra vires.

On the trial it was shown by the proofs that the stock was issued and the loan perfected, as stated in the declaration, by the assignment of stock and insurance policy and execution of said note and mortgage; that the by laws contained the above provision and that the rules and regulations above set out were printed in the pass book issued to appellee; that the property was destroyed at the time stated and that its value was much more than \$1,500.00; that appellee still owed appellant \$1,186,78 after deducting the value of his stock; that appellant had not notified appellee of the expiration of the policy assigned to it, nor had it caused another policy to be issued; that the secretary of the association was ill at the time appellant gave the note and mortgage above referred to and that the business was transacted on the part of appellant by one R. E. Renfro who acted as secretary of appellant with its knowledge and consent.

Appellee testified that when the loan was made Renfro promised to look after the insurance and not to let it expire; that Renfro said that he would take care of it. Renfro, testified that he did talk with appellee about having this old policy canceled and a new one written but that he did not remember having the conversation detailed by appellee or that he said anything about renewing appellee's policy. At the conclusion of the evidence one instruction was given on the part of appellee and as the appellant offered no instructions whatever, the court of its own motion gave one bearing upon appellant's case. The verdict of the jury was in favor of appellee for \$301.22 for which amount judgment was entered.

were filed by appellant to the satisfaction, the general issue, statute of frauds and after vices.

On the trial it was shown by the proofs that the stock was issued and the loan perfected, as stated in the declaration, by the assignment of stock and insurance policy and execution of said note and mortgage; that the by laws contained the above provision and that the rules and regulations above set out were printed in the pass book issued to appellee; that the property was destroyed at the time stated and that its value was much more than \$1,500.00; that appellee still owed appellant \$1,188.78 after deducting the value of his stock; that appellee had not notified appellee of the expiration of the policy assigned to it, nor had it caused another policy to be issued; that the secretary of the association was ill at the time appellee gave checks and receipts above referred to and that the business was transacted on the part of appellee by one R. E. Renfro who acted as secretary of appellee with its knowledge and consent.

Appellee testified that when the loan was made Renfro promised to look after the insurance and not to let it expire; that Renfro said that he would take care of it. Renfro testified that he did talk with appellee about having this old policy canceled and a new one written but that he did not remember having the conversation testified by appellee or that he said anything about renewing appellee's policy. At the conclusion of the evidence one instruction was given on the part of appellee and as the appellant offered no instructions whatever, the court of its own motion gave one bearing upon appellee's case. The verdict of the jury was in favor of appellee for \$301.22 for which amount judgment was entered.

That the plea of ultra vires cannot be availed of by appellant as a defense in this case, appears to be well sustained by the opinion of the supreme court in Chicago Building Society v. Crowell, 65 Ill. 453 . In that case Crowell procured a loan of money from the Building society, for which he gave his note secured by deed of trust upon certain real estate covenanting therein to keep the buildings on the premises insured in such company as the society should designate. By a subsequent arrangement, the society through its secretary and managing agent, agreed with Crowell to procure such insurance from him but before the same was effected, the buildings were destroyed by fire. Crowell thereupon brought suit against the society for its failure to procure the insurance and obtained a judgment in his favor. The court sustained his right of action, although it found that under the proofs, the damages allowed were excessive. The question of ultra vires was raised by the building society and upon that subject the court said, "The company was expressly authorized and empowered by the act of the legislature to make loans and provide for the security of the same on real estate, as well upon improved as upon unimproved property. As an incident to security upon improved real estate, no reason is perceived why it may not be regarded as within the powers granted, that the corporation should have the right to contract for insurance on the improvements on the property, to make more available and certain their security, and such a contract would be for the benefit of the company.....It was for the better securing of the loan made to appellee that the insurance was to be procured, and in this view it can hardly be said that it was not incidental

That the plea of ultra vires cannot be availed of by
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 lished by the opinion of the supreme court in Chicago Hold-
 ing Society v. Grosell, 65 Ill. 453. In that case Grosell
 procured a loan of money from the Building Society, for which
 he gave his note secured by deed of trust upon certain real
 estate covenanted therein to keep the buildings on the pre-
 mises insured in such company as the society should designate.
 By a subsequent arrangement, the society through its secre-
 tary and managing agent, agreed with Grosell to procure a new
 insurance from him but before the same was effected, the build-
 ings were destroyed by fire. Grosell thereupon brought suit
 against the society for its failure to procure the insurance
 and obtained a judgment in his favor. The court sustained his
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 tain their security, and such a contract would be for the ben-
 efit of the company. . . . It was for the better securing of the
 loan made to appellee that the insurance was to be procured, and
 in this view it can hardly be said that it was not incidental

to the legitimate purposes of the corporation, nor that it was not for its benefit. It was germane to the business that the corporation was transacting, and, in case of loss, would enure to its advantage..... Where corporations have exercised powers incidental to those conferred, and in furtherance of the general objects of the corporation, although the subject of the contract may not be within any express right conferred, they will be estopped from denying that they had authority to make such contracts. Good faith to third parties who deal with such corporations, and who may have no accurate knowledge of the extent of their powers under their charters, requires the adoption of this salutary rule. The rule has its foundation in the plainest principles of natural justice."

The principles above enunciated appear to be so applicable to this case that further comment is unnecessary. Appellant however strongly insists that the statute of frauds was a valid defense to the action for the reason that the policy was not to be renewed for more than a year after the verbal agreement was made. Were appellee's rights wholly controlled by this agreement or promise, appellant's position might be much stronger. His rights however were not so limited but he was entitled also to the benefit accorded to him by the by-laws, rules and regulations of the association above referred to. By these it was provided for the transfer by the borrower of his fire insurance policy to the association, as collateral security and also that about the time the same should expire, the secretary should notify the borrower and in case of the neglect or refusal of the borrower to renew the same, the secretary should renew the policy and charge the same to the borrower; that the secretary would after giving notice of

to the legitimate purposes of the corporation, nor that it was not for its benefit. It was germane to the business that the corporation was transacting, and, in case of loss, would entitle it to its advantage. . . . There corporations have exercised powers incidental to those conferred, and in furtherance of the general objects of the corporation, although the objects of the contract may not be within any express right conferred, they will be estopped from denying that they had authority to make such contracts. Good faith to third parties who deal with such corporations, and who may have no accurate knowledge of the extent of their powers under their charters, requires the adoption of this salutary rule. The rule has its foundation in the principle of natural justice. . . . The principles above enunciated appear to be so applicable to this case that further comment is unnecessary. Appellant however strongly insists that the statute of frauds was a valid defense to the action for the reason that the policy was not to be renewed for more than a year after the verbal agreement was made. Were appellant's rights wholly controlled by this agreement or promise, appellant's position might be much stronger. His rights however were not so limited but he was entitled also to the benefit accorded to him by the by-laws, rules and regulations of the association above referred to. By these it was provided for the transfer by the borrower of his life insurance policy to the association, as collateral security and also that about the time the same should expire, the secretary should notify the borrower and in case of the neglect or refusal of the borrower to renew the same, the secretary should renew the policy and charge the same to the borrower; that the secretary would after giving notice of

the expiration of a policy, cause the property to be insured in a company of his own selection. The provisions in reference to the renewals of policies, were for the mutual benefit of the association and the member who borrowed from it and in effect released appellee from looking after the renewal of his insurance himself by undertaking, on behalf of the association in case he refused and neglected to do so, to renew the insurance for him and charge the premium to him. The secretary had possession of the policy and it was his duty to inform appellee when it was ~~xxx~~ about to expire. This he failed to do and appellee had a right, under his written contract with appellant, to assume that the latter would conform to the terms of the same and renew the insurance for the benefit of both of them. We are of opinion that appellant's failure to comply with the terms of its contract with the appellee, as set forth in its by-laws, rules and regulations and the subsequent loss of the building, upon the premises in question by fire, gave appellee a right of action against appellant. Neither the amount of appellee's indebtedness, the amount of the policy, the cost of a new policy or the fact that the loss was more than the amount of the policy, appear to be in dispute and it would therefore seem that the verdict was for the correct amount

Appellant criticises the only instruction given in favor of appellee, but as it conforms to our views of the law as above set forth, it was, in our opinion, properly given. The judgment of the court below will be affirmed.

Judgment Affirmed.

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(Not to be reported in full.)

the expiration of a policy, cause the property to be insured in a company of his own selection. The provisions in reference to the renewal of policies, were for the mutual benefit of the association and the member who borrowed from it and in effect released appellee from looking after the renewal of his insurance himself by undertaking on behalf of the association in case he refused and neglected to do so, to renew the insurance for him and charge the premium to him. The necessary consequence of the policy and it was his duty to inform appellee when it was not about to expire. This he failed to do and appellee had a right, under his written contract with appellant, to assume that the latter would conform to the terms of the same and renew the insurance for the benefit of both of them. We are of opinion that appellant's failure to comply with the terms of the contract with the appellee, as set forth in the by-laws, rules and regulations and the subsequent loss of the building, upon the premises in question by fire, gave appellee a right of action against appellant. Whether the amount of appellee's indebtedness, the amount of the policy, the cost of a new policy or the fact that the loss was more than the amount of the policy, appear to be in dispute and it would therefore seem that the various issues for the court would be presented.

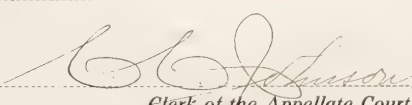
Appellant criticizes the only instruction given in favor of appellee, but as it conforms to our views of the law as above set forth, it was, in our opinion, properly given. The judgment of the court below will be affirmed.

Judgment affirmed.

(Not to be reported in full.)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

NOIN

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 191

Sherville Rec.

ERROR TO
APPEAL FROM

vs.

No. 24

Circuit COURT

October Term, 1914.

St Clair COUNTY

Raffles

TRIAL JUDGE

HON. Geo A. Brown

Term No. 34.

Agenda No. 12.

October Term, 1914.

F.B.Merrills, Receiver of the
Village of Cahokia,

Appellee,

vs.

James J. Rafter,

Appellant.

Appeal from St. Clair.

Opinion by Higbee, J.

This was a suit brought by appellee, F. B. Merrills, as receiver of the village of Cahokia against appellant James J. Rafter, upon the following promissory note:

"50.00.

East St. Louis, Ills., Jan'y. 7, 1907.

Six months after date we promise to pay to the order of George J. Laperch, supervisor, fifty 00/100 Dollars. For value received negotiable and payable without defalcation or discount and with interest from date at the rate of six per cent per annum.

James J. Rafter.

George J. Laperch."

The pleas filed to the declaration in assumpsit were the general issue and want of consideration. A jury was waived and the evidence having been heard by the court, the issues were found in favor of appellee and judgment entered against appellant for \$71.00.

~~The only question raised by appellant on this ap-~~
~~peal is~~ ^{contended} that the evidence showed a failure of consideration and, ^{just} therefore he was not liable upon the note. The proof introduced by appellee showed that he has duly appointed receiver of the village of Cahokia and that the note sued on was one of the assets of said village. Appellant testified in his own behalf that the note was without consideration and

October Term, 1914.

Appeal from St. Clair.

F.B. Merrill, Receiver of the
Village of Canokla,
Appellee,

vs.

James J. Rafter,

Appellant.

James J. Rafter

This was a suit brought by appellee, F. B. Merrill,

as receiver of the village of Canokla against appellant James

J. Rafter, upon the following promissory note:

"\$50.00. East St. Louis, Ill., Jan'y. 7, 1907.

Six months after date we promise to pay to the order of George

J. Rafter, supervisor, fifty 00/100 Dollars. For value re-

ceived negotiable and payable without deduction or discount

and with interest from date at the rate of six per cent per

James J. Rafter,
George J. Rafter.

annum.

The plea filed to the declaration in assumpsit

were the general issue and want of consideration. A jury was

waived and the evidence having been heard by the court, the

issues were found in favor of appellee and judgment entered

against appellant for \$71.00.

The only question raised by appellant on this ap-

peal is that the evidence showed a failure of consideration

and, therefore, he was not liable upon the note. The plea for-

produced by appellee showed that he has duly appointed receiver

of the village of Canokla and that the note was on his

one of the assets of said village. Appellant testified in

his own behalf that the note was without consideration and

that he did not get anything from Laperch, who was at the time supervisor. On cross examination, however, he stated that he was then an attorney for Laperch and represented him in connection with the fund in his hands during his administration of affairs as supervisor; that he signed the note at the request of Laperch and that Laperch was to give it back to him but he never did; that it was executed in a bank in East St. Louis and at the time it was executed Laperch drew a check on himself as supervisor for the \$50.00, but that what became of the money he did not know. The note was lost of both Laperch and appellant and upon it Laperch appears to have received \$50.00, which was in his hands as supervisor. Appellant knew that on account of the note, Laperch, as supervisor, paid over to himself individually the sum of \$50.00 and it was immaterial, so far as the rights of appellee are concerned, whether the money received on the note was paid to Laperch or to appellant, as both were liable for its repayment to the fund from which it was drawn. The judgment of the court below was right and is affirmed.

The abstract of record filed by appellant was so incomplete and insufficient as to make it necessary for appellee to file an additional abstract to enable the court to consider the merits of the case. A motion to tax the costs of such additional abstract against appellant, has been made by appellee, which will be granted and the clerk is ordered to tax the costs of the same against appellant, in accordance with the rules of this court in such case applicable.

Affirmed. *

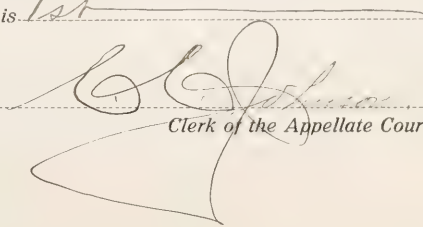
(Not to be published in full.)

that he did not get anything from Laparich, who was at the
time supervisor. On cross examination, however, he stated
that he was then an attorney for Laparich and represented him
in connection with the land in his hands during his adminis-
tration of affairs as supervisor; that he signed the note at
the request of Laparich and that Laparich was to give it back
to him but he never did; that it was executed in a bank in
East St. Louis and at the time it was executed Laparich drew
a check on himself as supervisor for the \$50.00, but that
what became of the money he did not know. The note is that
of both Laparich and a plaintiff and upon it Laparich appears to
have received \$50.00, which was in his hands as supervisor.
The plaintiff knew that on account of the note, Laparich, as su-
pervisor, paid over to himself individually the sum of \$50.00
and it was immaterial, so far as the rights of appellees are
concerned, whether the money received on the note was paid to
Laparich or to plaintiff, as both were liable for the repayment
to the fund from which it was drawn. The judgment of the
court below was right and is affirmed.

The abstract of record filed by plaintiff was an
incomplete and insufficient one to make it necessary for ap-
pellees to file an additional abstract to enable the court to
consider the merits of the case. A motion to tax the costs
of such additional abstract against plaintiff, has been made
by appellees, which will be granted and the clerk is ordered
to tax the costs of the same against plaintiff, in accord-
ance with the rules of this court in such cases applicable.
Affirmed.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

NOIN

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 193

~~ERROR TO~~
APPEAL FROM

vs.

No. 39

October Term, 1914.

Court

County

TRIAL JUDGE

HON.

W. M. Vandeventer

October Term, 1914.

Louise A u r,	}	
Appellee,		
vs.		Appeal from
East St. Louis Railway		City Court of
Company,		East St. Louis.
Appellant.	}	

Opinion by Higbee, J.

The second count of the declaration in this case, the count upon which it was tried, charged that appellee being a passenger upon a street car of appellant in the city of East St. Louis, signalled the car to stop at a certain street intersection, by pressing an electric button located in the car for that purpose and that the car was caused to slow down and stop at or near said street crossing; that while said car was stopped and remaining stationary, appellee attempted to get off of the same; that when she was in the act of getting off and in the exercise of due care for her own safety the appellant, by its servants, recklessly, negligently and without warning to appellee caused the car to suddenly move and start forward, throwing her off of the steps or back platform to and upon the street, thereby permanently injuring her. The jury returned a verdict against appellant for \$3-,000.00, but appellee, on the suggestion of the court, entered a stipulation of \$1,500.00 of that amount. A motion for a new trial was then overruled and judgment entered in favor of appellee for \$1,500.00. Appellant seeks to reverse this judgment, upon the

October Term, 1914.

Appeal from
City Court of
West St. Louis.

Louis A. W. v.
Appellant,
vs.
West St. Louis Railway
Company,
Respondent.

Opinion by Hibbes, J.

The second count of the declaration in this case, the count upon which it was tried, charged that appellee being a passenger upon a street car of appellant in the city of West St. Louis, signalled the car to stop at a certain street in-
tersection, by pressing an electric button located in the car for that purpose and that the car was caused to stop and
stop at or near said street crossing; that while the car was
stopped and remaining stationary, appellee alighted to get
off of the same; that when she was in the act of getting off
and in the exercise of due care for her own safety the car
went, by its servants, negligently and without
warning to appellee caused the car to suddenly move and start
forward, throwing her off of the steps or back platform as
and upon the street, thereby permanently injuring her. The
jury returned a verdict against appellant for \$25,000.00, and
appellee, on the suggestion of the court, entered a motion for
set of \$1,500.00 of that amount. A motion for a new trial was
then overruled and judgment entered in favor of appellee for
\$1,500.00. Appellee seeks to reverse this judgment, and the

grounds that the verdict was not sustained by the proofs and that therefore the peremptory instructions offered by appellant for a finding in its favor, should have been given, that the court erred in its ruling on the admission of certain evidence and in refusing some of appellant's instructions and that the judgment is excessive.

Appellant operated a street car line in East St. Louis having double tracks on Thirteenth street, running north and south, over which are operated the cars of the Lansdowne division which go straight through on that street and also other cars which turn west on Lynch Avenue, a street crossing Thirteenth street at right angles. It was the custom of appellant to stop its Lansdowne cars at Lynch Avenue at the far side of the street for receiving and letting off passengers. On the morning of November 17, 1913, appellee, a woman 63 years of age, took a Lansdowne car going south towards Lynch Avenue on Thirteenth street, intending to change at Lynch Avenue to a car going west on the Granite City line. As her car approached Lynch Avenue about five minutes before six o'clock, it being quite dark, she gave the signal for it to stop by pushing the electric button, causing the bell to ring and just as her car went on to Lynch Avenue on the west track, a car going to Granite City, approached from the south on the east track and made the turn into Lynch Avenue, crossing the track along which the car appellee was on was proceeding ahead of that car and compelling her car to slow down or stop, to permit the other to pass clear. As it did so some three or four passengers alighted and went to the Granite City car, among them being appellee who, in attempting to get off of the car, was thrown forward onto the street and received

...that the verdict was not sustained by the people and
-therefore the temporary instructions offered by the
-court in its favor, should have been given, that
-the court erred in its ruling on the admission of certain ev-
-idences and in refusing some of appellant's instructions and
-that the judgment is excessive.

Appellant operated a street car line in East St.
Louis having double tracks on Third street, running
north and south, over which are operated the cars of the
Lansdowne division which go straight through on that street
and also other cars which turn west on Lynch Avenue, a street
crossing Third street at right angles. It was the cus-
tom of appellant to stop the Lansdowne cars at Lynch Avenue
at the far side of the street for receiving and letting off
passengers. On the morning of November 17, 1917, appellant
had a car of this type of car, known as Lansdowne car going south
on Third street, on Third street west, intending to stop
at Lynch Avenue so a car going west on the Granite City line.
As her car approached Lynch Avenue about five minutes before
six o'clock, it being quite dark, she gave the signal for it
to stop by pushing the electric button, causing the bell to
ring and just as her car went on to Lynch Avenue on the west
track, a car going to Granite City, approached from the north
on the east track and made the turn into Lynch Avenue, cross-
ing the track along which the car appellee was on and proceed-
ing ahead of that car and causing her car to also come to
a stop, so as to be in the other car's way. At this point
three or four passengers alighted and went to the Granite City
car, leaving the appellee car, as stated, at the west
of the car, was thrown forward onto the street and receiving

severe injuries. The place where she was thrown off was some six feet south of the north curb of Lynch Avenue, which was not the accustomed place for the car to stop to receive and discharge passengers and that fact was shown to be known to appellee who had made the trip many times.

At the close of appellee's evidence, the court gave an instruction to the jury to find the defendant not guilty as to the first count of the declaration, but refused to give a like instruction concerning the second count. At the close of all the evidence, an instruction was offered by defendant to find it not guilty, which was also refused by the court.

It was shown that the conductor at the time in question, was in the middle of the car collecting fares and that neither he nor the motorman were paying any attention to the persons getting off of their car. Appellee testified that after she pushed the button she got up and went to the platform and stood there until the car stopped when she attempted to alight; that she was upon the top step and was stepping off with her right foot, when the car started and she was thrown into the street. It was her intention to take the Granite City car which was waiting, as did the others who had left the car she was on.

No instructions were given on behalf of appellee but at the request of appellant, the court among other instructions, gave one telling the jury that appellee could not recover if the car was not standing stationary but was in motion when she fell therefrom. There was no substantial controversy as to the facts in the case except as to those which bore upon the question as to whether the car was in fact stationary or in motion at the time of the injury. Upon this question five witnesses testified for appellee that the car

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... at the moment place for the car to stop to receive and ...
... the appellant and that she was thrown off the car ...
... the appellant who had made the trip many times ...
... At the close of appellant's evidence, the court gave ...
... an instruction to the jury to find the defendant not guilty ...
... to the first count of the indictment, but refused to give ...
... like instruction concerning the second count. At the close ...
... of all the evidence, an instruction was offered by defendant ...
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... It was not intended to take the evidence into consideration ...
... testimony, as did the others who had left the car and were ...
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... tionary or in motion at the time of the injury. Upon this ...
... question the appellant testified for appellee that the car

was standing still when she attempted to alight therefrom, while five for appellant testified that at that time the car was moving slowly. Under these conditions it was for the jury to properly determine which witnesses stated the facts correctly. They must have concluded that the car was standing still at the time appellee attempted to alight and that finding must prevail. Notwithstanding a number of persons were alighting at the place where the car must be held to have stopped, it was shown that no signal was given when the car started again, nor does it appear that any attention was paid to appellee or her safety by those in charge of the car.

It is claimed by appellant that it cannot be charged with negligence in this case because appellee was attempting to get off without notice of such intention on her part to the conductor or motorman at a place where passengers do not usually get on or off. The duty of a common carrier to look to the safety and protection of its passengers, so far as it can, consistent with the proper operation of its cars, is of a high character and not to be lightly disregarded. In *Ruch v. A. E. and C. R. R. Co.*, 150 Ill. App. 329, where appellee was thrown from a street car and injured, it is said, "As appellee was a passenger upon this car operated by appellant as a common carrier, it owed to appellee the duties laid down in *North Chicago St. Ry. Co. v. Polkey*, 203 Ill. 235 as follows: 'A railroad company as a common carrier of passengers, is held by the law to the use of the highest degree of care consistent with the practical operation of its railroad. It is bound to do all that human care, vigilance and foresight can reasonably do, consistent with the mode of conveyance, the practical operation of its road and the exercise of its business as a carrier.'"

...standing still, then the ...
...five ...
...moving ...
...properly ...
...They ...
...the ...
...was ...
...of the ...
...and shown ...
...again, ...
...before ...
...It is ...
...with ...
...ing to ...
...The ...
...usually ...
...to the ...
...own, ...
...a high ...
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...thrown ...
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...A ...
...of the ...
...ent with ...
...to do ...
...ably do, ...
...operation ...

was a suit brought by a woman for injuries claimed to have been received by her while attempting to alight from a street car. The charge in the two counts of the declaration was that the car ^{was} stopped at the corner of Washington street and Fifth avenue; that appellee attempted with due care and caution to alight and that the employee of the defendant company in charge of the train of cars, negligently and without warning, caused the car to be suddenly and violently started and thereby plaintiff was thrown with great force and violence from the car and injured. It was urged by the street car company that the declaration was deficient in that it omitted an averment that the place where the car was stopped, was a regular place of stopping for the purpose of enabling passengers to leave the car or that appellee notified the employee of appellant in charge of the car by signal or otherwise, of her desire or intention to alight there. It appeared in that case that the car stopped at or just before reaching the nearest walk of the street intersection and the contention of the company was that appellee should have remained in her seat until the car had crossed the intersection of the street and stopped at the further walk where it was required to stop by the ordinances of the city. In the course of the opinion it is said: "We incline to the view that whenever a street car is stopped at or near a crossing of streets, before the car is again put in motion the duty is cast upon those in charge of the car of exercising proper and reasonable care for the safety of passengers. It is within common knowledge and observation that passengers enter and alight from street cars

and a suit brought by a woman for injuries claimed to have been received by her while attempting to alight from a street car. The charge in the two counts of the declaration is that the defendant at the corner of Washington Street and Fifth Avenue, that appellee attempted with due care and caution to alight and that the employee of the defendant company in charge of the train of cars, negligently and without warning, caused the car to be suddenly and violently started and thereby by itself as shown with great force and violence fell the car and injured. It was urged by the street car company that the declaration was defective in that it failed to aver that the place where the car was stopped, was a regular place of stopping for the purpose of enabling passengers to leave the car or that appellee notified the employee in charge of the car of the car by signal or otherwise, of her desire or intention to alight there. It is stated in the brief that the car stopped at or just before reaching the corner of the street intersection and the contention of the company was that appellee should have remained in her seat until the car had crossed the intersection of the street and crossed at the further side where it was required to stop by the ordinances of the city. In the course of the opinion it is said: "We incline to the view that whenever a street car is stopped at or near a crossing of streets, before the car is again put in motion the duty is cast upon those in charge of the car of exercising proper and reasonable care for the safety of passengers. It is within common knowledge and observation that passengers enter and alight from street cars

at or near the crossings of streets, and that street cars stop at street intersections for the purpose of receiving and discharging passengers. If a car is brought to a stop at or near such crossings, it is not unreasonable to charge the conductor and grip-man in control of the car with notice that passengers may avail themselves of the opportunity thus presented for leaving the car, and also with the duty of exercising a reasonable degree of care, before putting the car again in motion, to see that passengers seeking ingress into or egress from the car are not in such positions as to be endangered by putting the car again in motion." Chicago West Div. Ry. Co. v. Mills, 105 Ill. 63, was another case where a woman was injured while attempting to alight from a car which was suddenly started and she was thereby thrown upon the street. It is there laid down to be a rule, "That people may get off when and where they please provided the car is stopped when they attempt to do so." In that case the car appears to have been stopped on State street between fifty and one hundred feet from Randolph street. In this case appellee had given notice of her intention to alight and the car had stopped on reaching the street where she desired to get out to take her connecting car. In view of the above authorities and the reasoning applicable to the conditions which existed at the time, it cannot be said that appellee was guilty of negligence per se in attempting, as did certain other passengers, to leave the car at that place and it appears to us to have been the duty of the employees of the company, under the circumstances to have refrained from starting the car until assured that the safety of none of the passengers was imperiled thereby.

The criticism of the ruling of the court in regard

at or near the crossings of streets, and that street cars
stop at street intersections for the purpose of receiving and
discharging passengers. If a car is brought to a stop at or
near such crossings, it is not unreasonable to charge the driver
with the duty of keeping the car under control of the driver and
passengers may avail themselves of the opportunity to leave the
car and leave the car, and also with the duty of exer-
cising a reasonable degree of care, before leaving the car
again in motion, to see that passengers receive proper notice
or advice that the car is not in such position as to be
dangered by putting the car again in motion." Chicago v.
City of Chicago, 105 Ill. 53, was another case where
a woman was injured while attempting to alight from a car
and suddenly started and she was thereby thrown upon the street.
It is there laid down to be a rule, "That people may not al-
ight from a car where they please provided the car is stopped when
they attempt to do so." In that case the car appears to have
been stopped on State street between fifty and one hundred
feet from Randolph street. In this case appellee had given
notice of her intention to alight and the car had stopped
standing the street where she desired to get out so that her
connecting car. In view of the above authorities on the ques-
tion of liability to the plaintiff - that appellee is liable
it cannot be said that appellee was guilty of negligence
as it is attempting to alight from the car, and it appears to us to have been the
duty of the employees of the company, under the circumstances
to have retained the car standing for a short time until the
alight of none of the passengers was in danger.

The criticism of the ruling of the court is that

to the admission of evidence; is that objections made by appellee, were sustained to questions propounded in evidence by appellant, as to whether the car had stopped to let any body off or to receive passengers before appellee fell, or whether it was customary prior to that time to stop cars at the near side of the crossing for passengers to get off. It may be said that the record shows that appellee herself stated on cross examination, that at that time the regular stopping place was at the far crossing of the street, so that appellant got the benefit of this proof at any rate. In our view of the law however, as above expressed, the exclusion of the testimony bearing upon the subject named, was not a material error effecting the verdict or judgment.

Appellant further complains that three of the instructions offered by it were improperly refused by the court. An examination of them shows that two of them were substantially covered in all material respects by other instructions given for appellant. The other, refused instruction No. 4, was not in accordance with our views of the law in regard to the duties owing by appellant to its passengers at the place where appellee was trying to alight and in our opinion was properly refused. As to the claim that the damages allowed were excessive, the proofs show that appellee was working by the day, that her wrist was injured so that she could not go back to work and had been in that condition for six months at the time of the trial; that she could not reach up with her hand and that things dropped from it when she attempted to use it. There was also the evidence of a physician tending to show that the injury was permanent. It is always difficult if not impossi-

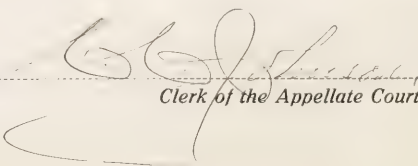
...to estimate that the damages are under \$100,000 in this case the judgment of the jury was
that appellee was entitled to \$100,000 for her injury, and
since a reversal was made by appellee of half of that amount,
and the judgment was set for \$1,800.00, we do not feel warranted in holding that it is not fairly supported by the evidence of being excessive. The judgment in this case will be affirmed.

REVEREND JUSTICE

(Not to be reported in full)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

NOIN

1944A 196

752

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

✓ Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 196

ERROR TO
APPEAL FROM

vs.

No. 40

October Term, 1914.

Circuit COURT

Marion COUNTY

Alexander

TRIAL JUDGE

HON. Albert M. Rose

Term No. 40.

Agenda No. 33.

October Term, 1914.

Harold C. Hardy,

Appellee,

vs.

A. J. Alexander,

Appellant.

Appeal From Marion.

*Action by against
to recover \$70.00*

Opinion by Higbee, J.

Appellee claimed to have loaned appellant ~~\$70.00~~ ^{from}

~~which had not been repaid to him and instituted suit before a justice of the peace in Marion county to recover the same. There was an appeal to the circuit court, where a jury returned a verdict in favor of appellee and judgment for \$70.00 and costs was entered against appellant, from which an appeal ^{was} has been taken to this court. The two reasons assigned by appellant, why the judgment should be reversed are that the verdict was not supported by the evidence and that the court erred in giving appellee's second instruction.~~

In addition to appellee himself, only one witness was introduced in his behalf and that one testified only as to facts concerning another law suit which grew out of the transaction upon which this suit was based. No witness was whatever was examined on the part of defendant, so that the facts bearing upon the case were presented almost wholly by the testimony of appellee alone. According to the testimony of appellee, ^{testified that} he was on the 28th of March, 1913, a bar tender in the employ of appellant, who was at the time conducting a saloon. Appellant wished to raise \$140.00 to pay to one Nick

October Term, 1914.

Harold O. Hardy

Appellee,

vs.

E. J. Alexander,

Appellant.

Appeal From Marion.

Opinion by Mr. Justice

Justice claims to have found material facts

which had not been repaid to him and instituted suit before

a justice of the peace in Marion county to recover the same.

There was an appeal to the circuit court, where a jury returned

a verdict in favor of appellee and judgment for \$70.00 and

costs was entered against appellant, from which an appeal has

been taken to this court. The two reasons assigned by appel-

lant, why the judgment should be reversed are that the ver-

dict was not supported by the evidence and that the court erred

in giving the jury's second instruction.

In addition to appellee himself, only one witness

was introduced in his behalf and that one testified only as

to facts concerning another law suit which grew out of the

transaction upon which this suit was based. No witness who

whatever was examined on the part of defendant, so that the

facts bearing upon the case were presented almost wholly by

the testimony of appellee alone. According to the testimony

of appellee, he was on the 10th of March, 1911, a bar tender

in the employ of appellant, who was at the time conducting a

saloon. Appellant wished to raise \$140.00 to pay to one Nick

~~Carter for a pair of horses, and not having the amount asked~~
~~appellee for what he lacked and the latter gave him a check~~
~~for \$70.00 which amount has never been paid back. Appellant~~
~~paid the \$140.00 to Carter and took back a bill of sale on~~
~~the horses. There was afterwards a law suit between appel-~~
~~lant and Carter, the latter claiming the right to redeem the~~
~~horses, while appellant claimed there was a sale outright to~~
~~him. Upon the trial of that case, the court found that Cart-~~
~~er had the right to redeem and thereafter he paid appellant~~
~~\$43.55. Appellee stated that appellant said to him at the~~
~~time he got the money, "you let me have this money and if I~~
~~make any money, why, I will pay you well for the use of it,~~
~~but if I don't make any you cannot lose any. I will stand~~
~~between you and all danger." On cross examination it was~~
~~developed that appellee was a witness in the Carter case, and~~
~~that he there made statements which were to some extent incon-~~
~~sistent with the claim that appellant owed him the \$70.00. In~~
~~this case, however, he swore positively to the fact that ap-~~
~~pellant owed him this amount, and that statement was not con-~~
~~tradicted. The jury heard the statement and found a verdict~~
~~in favor of appellee based thereon. Appellee's testimony, if~~
~~true, was sufficient upon which to base the verdict and we~~
~~find no reason in the record why it should be disturbed.~~

~~The theory of appellant in his brief is, the trans-~~
~~action was a partnership venture between him and appellee and~~
~~that he had paid out in fees and expenses in litigation, con-~~
~~cerning in the horses as much as he received from Carter and~~
~~that~~
~~appellee should bear the loss.~~

~~The second instruction given for appellee, which is~~

The second instruction given for appellee, which is
 "appellee should bear the loss."
 concerning the horses as much as he received from Carter and
 that he had paid out in fees and expenses in litigation, con-
 sidering the partnership venture between him and appellee and
 the theory of partnership in his trial, the trans-
 fer of the horses to the appellee was a receipt on the part of
 appellee for the horses and the latter gave him a check
 for \$70.00. Appellee then gave Carter a bill of sale on
 the horses. There is also a bill of sale between appel-
 lant and Carter, the latter claiming the right to return the
 horses, while appellee claimed there was no such obligation to
 him. Upon the trial of that case, the court found that Car-
 ter had the right to return and thereafter he paid appellee
 \$45.55. Appellee stated that appellee said to him at the
 time he got the money, "you let me have this money and if I
 make any money, why, I will pay you well for the use of it,
 but if I don't make any you cannot lose any. I will stand
 between you and all danger." On cross-examination it was
 developed that appellee was a witness in the Carter case and
 that he there made statements which were to some extent incon-
 sistent with the claim that appellee owed him the \$70.00. In
 this case, however, he swore positively in the last trial ap-
 pellee owed him this amount and that statement was not con-
 sidered. The jury heard the statement and found a verdict
 in favor of appellee based thereon. Appellee's testimony, if
 true, was sufficient upon which to base the verdict and as
 such is not a reason for setting it aside on appeal.

At the request of the office
~~complained of by appellant, told the jury, if they found the~~
~~parties were engaged in a single joint enterprise or venture~~
~~and that in the furtherance of that enterprise or venture,~~
~~appellee loaned appellant any money or moneys to be used by~~
~~the defendant in such joint enterprise or venture, and that~~
~~appellant did so use such moneys and had not repaid to appel-~~
~~lee the money so loaned, they should find the issues for ap-~~
~~pellee. This instruction was not well constructed, but it~~
~~was not so defective as to constitute reversible error in~~
~~this case, especially in view of the fact that the jury were~~
~~plainly told by another instruction that if they found from~~
~~a preponderance of the evidence that plaintiff and defendant~~
~~were partners in making the loan, and were to share equally~~
~~in the profit, they should find the issues for appellant.~~
~~The judgment of the court below in this case will be affirm-~~
~~ed.~~

~~Judgment affirmed.~~

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(Not to be reported in full.)

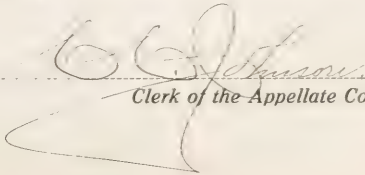
Let the respondent of the appeal be
acquainted of the appellant, told the jury if they found the
parties were engaged in a single joint enterprise or venture,
and that in the furtherance of that enterprise or venture,
appellant loaned appellant any money or money to be used by
the defendant in such joint enterprise or venture, and that
appellant did so use such money and had not repaid to app-
ellant the money so loaned, they should find the issues for ap-
pellant. ~~This instruction was not to be given, but it is~~
~~not an error to so instruct the jury in~~
~~this case, especially in view of the fact that the jury was~~
~~plainly told by another instruction that if they found from~~
~~a preponderance of the evidence that appellant and defendant~~
~~were partners in making the loan, and were to share equally~~
~~in the profit, they should find the issues for appellant.~~
~~The purpose of the court was to give the jury the right to~~

Instructions

(Not to be returned to jury)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

1941A 198

753

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

✓ Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 198

~~ERROR TO~~
APPEAL FROM

vs.

No. 41

October Term, 1914.

Circuit COURT

Marion COUNTY

TRIAL JUDGE

HON.

A. M. Rose

October Term, 1914.

Henrietta Crouch.

Appellee,

ya.

City of Centralia,

Appellant.

~~Appeal from Nation.~~

Actions by & against
the

~~Opinion by Higbee, J.~~

This is an appeal from a judgment of the circuit court of Marion County in favor of appellee, Benjiette Cannon against appellant, City of Centralia, for \$2,500.00 recovered in a suit brought by her for personal injuries alleged to have been sustained by her in falling into a ditch. ^{From a car's wheel} ~~from a judgment for \$2,500 in favor of the~~ ^{as a sidewalk crossed such ditch on Columbus street, in the} ~~plaintiff in defendant's appeal.~~ City of Centralia. There were three counts in the declaration, the negligence charged against appellant in the first, was its failure to maintain railings on the sidewalk across the ditch, in the second a failure to maintain a light sufficient to, near the crossing, to enable persons passing over it to see the dangerous condition and the third count is a combination of the charges of negligence stated in the other counts. There was no substantial that the city was guilty of the acts of negligence complained of or that appellee received some injury therefrom, but there was a contest as to the extent and recovery of the injury, and also as to whether, as alleged by appellant, the injury was not brought about by appellee's defective eyesight. *The only question*

Benjamin G. Brown,

Appellant,

vs.

City of Centralia,

Appellee.

Appeal from District Court of Washington.

Opinion by Justice, J.

This is an appeal from a judgment of the district

court of Washington, to-wit: in favor of appellee, Benjamin G. Brown, against appellant, City of Centralia, for \$2,800.00 damages as to a sale brought by her for personal injuries alleged to have been sustained by her in falling into a ditch, which ditch is located on the highway between the City of Centralia and the City of Olympia. There are three causes in the complaint, the first of which is that the appellee, Benjamin G. Brown, is entitled to recover damages from the City of Centralia for the injuries sustained by her in falling into the ditch, and the second is that the City of Centralia is liable for the damages sustained by her in falling into the ditch, and the third is that the City of Centralia is liable for the damages sustained by her in falling into the ditch. The first cause is dismissed, the second is granted, and the third is granted. The judgment of the district court is affirmed.

Benjamin G. Brown, Plaintiff.

City of Centralia, Defendant.

~~From the proofs we obtain the following facts bearing upon the case: On the south side of Calumet street, running east and west in the city of Centralia, where the same is intersected by south Maple street, is a ditch. About six feet east of the east line of south Maple street, there is a crossing running north and south over Calumet street. In constructing this crossing over the ditch aforesaid, the city placed a number of tile therein and covered them with cinders. Some who planned this for ^{the purpose of} ~~the purpose of~~ to keep the cinders in place, boards were notched to fit over ~~the tiles and placed so that they extended a little above the top of the cinders.~~ ^{into a ditch three and a half feet in depth.} The ditch at this place was three feet wide, three and a half feet deep on the west side and two and a half feet deep on the east side, and the cinder walk across the same was four and one-half feet wide. There were no railings at the sides of the crossing and the nearest street light was located some 500 feet north of the crossing in Maple street. On the evening of November 1, 1913, at about 7 o'clock, 19 being then quite dark, Appelien left her home on the east side of south Maple street, about half a block south of Calumet street, and started north to deliver a basket of milk to some parties living north of that street. She had lived in this vicinity for about two years and had traveled over the same route on the same errand once or twice a day for six months. When she reached Calumet street she turned to her left a few feet and then started to cross the cinder crossing over the ditch and in doing so, stepped off of the west side thereof and fell into the ditch. After lying there for some little time she got out and then went ^{to a neighbor} ~~on~~ and delivered her milk, and returned home by the "team road." From her fall she re-~~

[illegible]

received bruises in two places on her left arm and on the right. Her left ankle was sprained, there was a bruised spot below the knee and two ribs were broken. Her most serious ^{was} ~~injury~~, however, seems to be, as claimed, to her back and head, and her ~~necks~~ ^{that} ~~were~~ ^{that} ~~claimed to be~~ ^{that} ~~seriously affected,~~ and at times while walking she would stagger against things and on one or two occasions this caused her to fall down. When she walked along, she ^{had} ~~would have to~~ catch hold of things to balance herself and her neck and back were still hurting her at the time of the trial. She was a woman fifty-two years of age; and before her injury was strong, in good health and able to do all kinds of work. After it she became emaciated and unable to perform her household duties. ^{A physician} ~~She did not call a~~ ^{who attended her after the accident} ~~doctor for about a week after she received her injury when she~~ ^{testified that he} ~~called Dr. Hall. He found her suffering from the troubles~~ above mentioned, and testified on the trial that her injuries would disable her more or less for the balance of her life, and that her nervousness might or might not be cured.

~~The facts in this case plainly showed a right of recovery for some amount on the part of appellee. Appellant, however, contends, that the judgment should be reversed and the cause remanded, because at the time of the trial it was impossible to determine whether the result of the injuries complained of were permanent or not, that~~ ~~it was for~~ ~~all~~ ~~was~~ ~~permitted to answer improper questions and that the~~ ~~court erred in refusing proper instructions offered by~~ ~~appellant.~~ The injury was received November 1, 1913, appellee commenced her suit December 27, 1913, and the cause was tried February 5 and 6, 1914, ~~it~~ ~~within a few days over three~~ ~~months.~~

[illegible]

which appellant asserts, ^{was} too short a time for it to be determined whether the consequences of her injuries were going to be lasting and permanent. Upon this subject, as above stated, Dr. Hall testified that her injury could disable her more or less for the "balance of her days." Another physician, Dr. Stokes, ^{testified} as an expert, that he should judge from the condition and injuries ~~as submitted to him in the question~~ ^{presented}, that there had been some injury to the spinal cord, "that is one of the nervous centers", and that such conditions were usually permanent. ^{Another} ~~third~~ physician ^{also} ~~stated~~, stated that the plaintiff's symptoms ~~as submitted to him~~, indicated disturbances, diseases or affections of the nervous system, but that he could not state positively whether the injuries could be permanent or not. ^{The attending} ~~Dr. Stokes~~ ^{physician} ~~also in his testimony stated that appellee's injury "might be that is called traumatic neurosis" and appellant argues~~ ^{that} ~~the the jury must have found that appellee was so afflicted.~~

Based upon this presumption appellant contends that this case should be reversed upon the authority of Ayers v. City of Centralia, 133 Ill. App. 290, a case decided by this court. In that case the court held that taking into consideration the subsequent proceedings and the nature of the injuries claimed on the trial, the need of the city for further time in preparation of the case and of the party injured for the development of chronic neurasthenia, if such was the result of the injuries, would seem to have been required. It is also further said, "In a large measure the damages claimed by defendant in error, and allowed by the jury in this case, were

because of defendant in error's nervous liability, neurasthenia, supposed to have been caused by the fall for which the action was brought.. To determine whether defendant in error was suffering, as stated in I. C. R. R. Co. v. McCullom, supra, "from that most subtle and easily simulated ailment known as traumatic neurasthenia, in other words, an impairment of the nervous system by nervous shock" newly discovered evidence shown by affidavit in the motion for a new trial was material, and though not calculated to defeat the action entirely, should, in justice, be heard upon the question of damages. It is furthermore to be considered that the time intervening between the injury and the trial was scarcely sufficient fairly to determine that the injury was chronic or permanent.* It may be said in this case, appellee does not claim that she was affected with traumatic neurosis or neurasthenia, and that the only suggestion to that effect is a statement of one of the expert physicians, who said that her affliction "might be what is called traumatic neurosis." In the Ayers case above referred to there was an affidavit in support of a motion for a new trial alleging newly discovered evidence, upon the subject of the appellee's injuries and there appears to have been also a motion for a continuance which had been denied when the case was called for trial, so that it is apparent that the city desired more time in which to prepare to controvert the fact that appellee was afflicted with traumatic neurosis occasioned by the injuries received by her. In this case however the appellant appears to have gone to trial without objection; ^{2 and} it offered no evidence whatever ^{to array CM} on the basis for the question of damages, and made no claim in support of its

evidence of defendant in error's narrow belief, defendant
 supposed to have been caused by the fall for which the action
 was brought. To determine whether defendant in error was
 liable, as stated in I. & R. Co. v. McGillion, supra, "from
 that most subtle and easily simulated ailment known as
 vertigo, or rather, in other words, an impairment of the
 nervous system of nervous shock, newly discovered evidence
 shown by affidavit in the action for a new trial was material,
 and though not calculated to defeat the action entirely, enough
 to justify, or bear upon the question of damages. It is for-
 gettable to be considered that the first testimony of the
 the injury and the trial was seriously sufficient fairly to
 determine that the injury was chronic or permanent. It may
 be said in this case, appellee does not claim that she was
 afflicted with vertigo, or with vertigo, or with
 the only suggestion to that effect is a statement of one of
 the expert physicians, who said that he believed "might be
 that a chronic traumatic vertigo." In the Ayres case above
 referred to there was an affidavit in support of a motion for
 a new trial alleging newly discovered evidence, when the sub-
 ject of the appellee's injuries and there appears to have been
 also a motion for a continuance which had been denied when the
 case was called for trial, so that it is apparent that the
 city desired more time in which to present its case. It is
 fact that appellee was afflicted with traumatic vertigo and
 sustained by the injuries received by her. In this case how-
 ever the appellant appears to have gone to trial without ob-
 jection, it offered no evidence whatever on the question of
 the question of damages and made no claim in support of its

motion for a new trial, that there was any newly discovered evidence or any other facts known to it, bearing upon the question of the measure of damages, other than that shown by the evidence. Appellee's right of recovery does not even rest upon the question whether she is afflicted with traumatic neurosis or not and the damages awarded her for the injuries which she is shown to have received, cannot be considered so excessive as to justify a new trial to enable appellee to determine whether or not the injury to her nervous system was in fact permanent. Upon the whole case the verdict was, as it appears to us, supported by the proofs.

Complaint is made by appellant that over its objection, Dr. Stoker, after having had the injuries recited to him, was permitted to testify that the ~~myxomatous~~ symptoms indicated some injury to the spinal cord, that is one of the nervous centers. ~~Also~~ Also that Dr. Hall on being asked, whether the condition that ~~appellant~~ was in and the suffering she had by pains in the back and dizziness, were or were not caused by the injuries which he found she had received when he first called on her, assuming that she had received those injuries from a fall off of the sidewalk into the ditch, was permitted to answer over the objection of appellant, "I think those symptoms are the result of some injury". The complaint is that these answers permitted the physicians to determine whether or not the injury was produced by the fall, which was a question of fact for the jury. We do not so interpret the testimony of these physicians. They did not undertake to say that her injuries were in fact produced by her fall into the ditch in question, but only stated that certain

...for a new trial, that there was any newly discovered evidence or any other facts known to it, bearing upon the question of the amount of damages, other than that shown by the evidence. The trial court's finding of recovery does not rest upon the question whether the plaintiff is entitled to recover in damages or not, but the damages awarded her for the injury which she is shown to have received, amount to recovery for an excessive or unjustly a new trial to enable her to determine whether or not the injury to her nervous system was in fact permanent. Upon the whole case the verdict was, as it appears to me, supported by the facts.

Complaint is made by appellant that over the testimony of Dr. Stoker, after having had the injuries pointed out to him, was permitted to testify that the system was injured in some injury to the spinal cord, that is one of the serious diseases. There also that Dr. Hall do testify whether the condition that appellant was in was the result of the injury to the spine in the back and elsewhere, was or was not caused by the injuries which he found the plaintiff when he first called on her, assuming that she had received these injuries from a fall off of the stairs and that she was permitted to answer that the condition of the system was the result of some injury. The complaint is that there are no permitted the physician to determine whether or not the injury was produced by the fall, which was a question of fact for the jury. We do not so interfere with the testimony of these physicians. They did not testify to the fact that the injuries were in fact produced by the fall into the ditch in question, but only stated that certain

conditions could produce certain results which it was proper for them to do. In the case of Chicago v. Didier, 327 Ill.571, many cases bearing upon this question are reviewed and the court there announced the doctrine that where the question is whether certain physical conditions shown to exist are the result of an injury, the injury itself and the manner in which it was received not being in dispute, physicians may express opinions as to whether the injury was the result of such physical conditions, and the court said in the course of its opinion, "the reason given for permitting a properly qualified witness to give his opinion as to what did produce certain results or consequences and not what might have produced them, is that the fact to be established is what did cause the conditions found to exist. Where the determination of that question involves scientific knowledge or skill which is possessed only by those who have given the matter special study and with which jurors and others engaged in the ordinary occupations of life, are unfamiliar, a witness possessing the necessary qualifications, may be asked for his opinion as to what did cause the conditions described. Such an opinion is not conclusive and subject to be contradicted by other evidence. It is for the jury to determine the weight and value of such opinion when considered in connection with all the evidence in the case." The examination of the physicians was clearly within the rule above enunciated and their testimony was properly admitted. Appellant further complains that five of the instructions asked by it were refused by the court and insists that such refusal was error. No statement however is made by appellant of any reason why the claim of error in refusing these instruc-

[illegible]

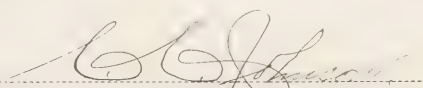
tion is made and therefore their correctness is not properly before us for construction. Hoffman v. W. & C. Co., 163 Ill. App. 332. Omensky v. Gieske, 125 Id. 77; Chicago V. Spear, 91 Id. 473. We have however examined appellant's refused instructions and taking into consideration the instructions which were given and the facts of the case, we are satisfied there was no error in refusing them. The judgment of the court below will be affirmed.

Judgment Affirmed.

(Not to be reported in full.)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

14A 200

754

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

✓ Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 200

Idem. Adm.

~~ERROR TO~~
APPEAL FROM

vs.

No. 43

October Term, 1914.

Gily COURT

Graville Gily COUNTY

Corn Products Ref. Co.

TRIAL JUDGE

HON.

James C. McBride

Term No. 43.

Agenda No. 51.

October Term, 1914.

Jeremiah Odum, Administrator,
etc.,

vs.

Appellee,

Appeal from
City Court of
Granite City.

Corn Products Refining Com-
pany,

Appellant.

Opinion by Higbee, J.

Admitted by Jeremiah Odum as administrator of the estate of Samuel Batson, deceased, ^{against whom} brought this suit to recover damages for the benefit of the next of kin of his intestate, who received injuries resulting in his death, while in the employ of the ^{defendant} Corn Products Refining Company. The case is brought here by the defendant below on appeal from the city court of Granite City, where there was a verdict and judgment in favor of the plaintiff for \$1,000.00, *from which the defendant appealed.* Appellant, ^{being} engaged in extracting syrup from the kernels of corn and preparing the grain remaining for food purposes, in conducting the business it made use of a large building called the mill house, ^{and as} here, on the lower floor, ^{was} located a grinding machine or mill. ^{and} At a distance of from 100 to 150 feet from the mill was an elevator which consisted of a six story brick building, the main part of which was square, with two cylindrical tanks adjoining. Adjoining the mill house, which was called the feed mill, was a fan or cake house ^{containing} here a large fan ^{and} was located and from the top of this an 18 inch pipe extended to the sixth story of the elevator building. When the ground grain had passed through the mill,

October Term, 1914.

Appeal from
City Court of
Lawrence, Kan.

Jeremiah Odum, Administrator,
vs.
Corn Products Refining Com-
pany,
Appellant.

Opinion by Hibbes, J.

Section 1. Jeremiah Odum as administrator of the estate of Sam-

uel Batson, deceased, brought this suit to recover damages

for the benefit of the next of kin of his intestate, who re-

ceived injuries resulting in his death, while in the employ

of the Corn Products Refining Company. The case is brought

here by the defendant below on appeal from the city court of

Lawrence, Kan., where there was a verdict and judgment in fav-

or of the plaintiff for \$1,000.00. From which the city

court of Lawrence, Kan., has appealed.

Issues of fact and law are presented for determination.

Issues of fact are presented for determination.

Issues of law are presented for determination.

Issues of fact are presented for determination.

Issues of law are presented for determination.

Issues of fact are presented for determination.

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Issues of fact are presented for determination.

Issues of law are presented for determination.

Issues of fact are presented for determination.

Issues of law are presented for determination.

it was conveyed by means of fans through ^{said} pipe to the sixth story of the elevator and dropped into a hopper from whence it was afterwards taken, soaked and prepared for market. On August 10, 1910, and prior thereto, Samuel Batson, foreman of the elevator, ~~and was in charge of five or six men who soaked the grain prepared for food and attended to other matters about the elevator.~~ About four o'clock in the afternoon of that day, there was an explosion in the sixth or upper story of the elevator which tore off that story of the building and threw part of a wall upon Batson, inflicting fatal injuries upon him.

Jeremiah Odum was appointed administrator of the deceased and a former trial of this case resulted in a judgment for the like amount of \$1,000.00 from which an appeal was taken to this court which reversed the judgment and remanded the cause. The opinion filed by this court in that case (Odum v. Corn Products Refining Co., 173 Ill. App. 348) gives a detailed and minute statement of the facts and circumstances leading up to the injury and it is therefore unnecessary to repeat the same at this time. Upon the second trial of the case the fourth count of the original declaration, upon which the case went to the jury, was so amended ^{so} that it directly charged that the defendant so negligently and carelessly operated, handled, managed and controlled its feed house and the mill, machinery, connections and appurtenances, that by and through such negligence and carelessness, a fire occurred in said feed house and reached the upper floor of the elevator building through the cyclone pipe which connected the elevator building with said feed house, by means thereof an explosion occurred in said elevator building. The evidence on the

it was conveyed by means of lane through said pipe to the
fifth story of the elevator and dropped into a hopper from
whence it was afterwards taken, soaked and prepared for market.
On August 12, 1910, and prior thereto, Samuel Batson, a former
owner of the elevator, and in 1909 and 1910, and in 1911 and 1912,
acted as the person in charge of the elevator and was in charge of
the elevator about the time of the explosion. About four or five
feet away from the elevator, there was an explosion in the fifth
story of the elevator which tore off that story of the build-
ing and threw part of a wall upon Batson, inflicting fatal
injuries thereon.

Jeremiah O'Connell was appointed administrator of the
deceased and a former trial of this case resulted in a judg-
ment for the like amount of \$1,000.00 from which an appeal was
taken to this court which reversed the judgment and remanded
the cause. The opinion filed by this court in that case (O'Connell
v. Corn Products Refining Co., 175 Ill. App. 328) gives a de-
tailed and minute statement of the facts and circumstances
leading up to the injury and it is therefore unnecessary to
repeat the same at this time. Upon the second trial of the
case the fourth count of the original declaration, upon which
the case went to the jury, was so amended that it directly
alleged that the defendant so negligently and carelessly
erected, handled, managed and controlled its feed house and the
mill, machinery, connections and appliances, that by reason
through such negligence and carelessness, a fire occurred in
said feed house and burned the lower floor of the elevator
building through the elevator pipe which connected the eleva-
tor building with said feed house, by means thereof an explosion
occurred in said elevator building. The evidence on the

second trial was substantially the same as that at the former trial, except that ^{the witness for the} appellee attempted to qualify the witness John Kruse as an expert, and as such he was permitted to give his opinion, ^{as an expert} as to what caused the explosion, his opinion being, as stated by him, that the explosion was caused by a fire in the feed mill. He testified that he had experience in general repairing and building machines in different places; that he had worked for this company ^{the appellant for about} three years lacking a month; that the first year he was a machinist, that he was afterwards promoted to fireman, his duties being to look after repairs of the machines and machinery in the buildings under the instructions of the master mechanic. He was then asked this question by the attorney for appellee, "From your experience and observation covering a period of fourteen years and assuming the facts testified by witnesses in reference to this explosion are true, what in your judgment caused the explosion and where did the fire originate that caused it?" Counsel for appellant objected and the court said, "Well this man is familiar with the conditions that were there, as a workman. The determination of the cause of this explosion will finally be the expression of an opinion, the final opinion to be given by these jurors based upon all the light that can be given them from the witness stand. The opinion of this witness as asked for now is an opinion of facts based upon his knowledge of the conditions existing at that place at the time and I am inclined to think that it is competent evidence. The objection will be overruled." ^{as which} The witness thereupon answered, "Well, I think it originated in the mill"; and in answer to a further question stated that it was in the feed house. The witness did not himself know where the fire originated, but

...-trial was undoubtedly the same as that of the expert
...-right that appears, ...
...-and as much as was ...
...-the ...
...-that the ...
...-in general repairing and building machine in different places;
...-that he had worked for this company, ...
...-month; that the first year he was a machinist, that he was
...-afterwards promoted to fireman, his duties being to look af-
ter repairs of the machines and machinery in the building
under the instructions of the master machinist. He was then
asked this question by the attorney for the defense, "From your
experience and observation covering a period of fourteen years
and assuming the facts testified by witnesses in reference to
this explosion are true, what in your judgment caused the ex-
plosion and where did the fire originate that caused it?"
...-and the court said, "Well this
...-the conditions that were ...
...-The determination of the cause of this explosion
...-the expression of an opinion, the final opin-
ion to be given by these jurors based upon all the light that
can be given them from the witness stand. The opinion of this
witness as asked for now is an opinion of facts based upon his
...-and I am inclined to think that it is competent evidence. The
objection will be overruled." The witness thereupon answered,
"Well, I think it originated in the mill"; and in answer to a
further question stated that it was in the first house. The
witness did not himself know where the fire originated, but

based his testimony upon the facts testified to by witnesses, showing the conditions surrounding the explosion. The evidence from which he drew his conclusion was about matters and things of common observation, from which the jury were as competent to draw the correct conclusion concerning the origin of the fire as this witness. The particular matter concerning which he was called upon to testify, does not appear to us to have been a proper subject for expert testimony. While it is sometimes permitted that an expert, skilled in the particular matter in question, give his opinion from circumstances in evidence, embraced in the hypothetical question as to what might or might not have caused an accident or injury, as in *Goddard v. Enzler*, 232 Ill. 462, where an expert electrician was permitted to state how an electrical shock might have been received by a person who was injured by an electric current, yet the question in that case involved the exercise of special knowledge while the question here, involved only such knowledge as might be possessed by any one of ordinary judgment. The opinion expressed by this witness was upon a question vital to the case as appears from our former opinion and we think the court erred in admitting it.

The case now, as on the former trial, stands on the charge of negligence in operating the machinery in the mill house and a general charge of negligence seeking to invoke the doctrine of *res ipsa loquitur*. In our former opinion, the latter point is discussed at length and from the facts and authorities there cited, we concluded that as the elevator was in control of appellee's intestate, the doctrine could not be invoked unless it was shown that the fire came from the mill house, which was in the control of appellant; and there-

~~for under either charge, before a verdict could be permitted~~

fore under either charge, before a verdict could be permitted to stand, it was necessary for appellee to prove the fire was communicated from the mill house to the elevator. We find no competent proof in the record of the last trial different from that produced on the former trial, to show that the mill machinery was not of an approved plan for the purpose used nor that it was not in good condition and properly operated at the time. To say that the fire was communicated through the pipe from the mill to the elevator, is a mere conjecture as there was no competent evidence in the case sufficient to sustain it. What was said in our former opinion concerning the facts in this case and the law applicable thereto, is equally pertinent here and further discussion presenting our views would only be a repetition of what we have already said.

The judgment of the court below will be reversed and the cause remanded.

Reversed and remanded.

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(Not to be reported in full.)

Intermittent Discharge

There under other things, which is a matter of fact, we are not to stand, it is necessary for us to prove the life as

communicated from the mill house to the elevator. The line

we competent proof in the record of the last trial different

from that produced on the former trial, to show that the mill

machinery was not of an old type, and that the machinery was not

that it was not in good condition and that it was not

the time. To say that the life was communicated through the

pipe from the mill to the elevator, is a mere conjecture as

there was no competent evidence in the case sufficient to estab-

lish it. What was said in our former opinion concerning the

fact in this case and the law applicable thereto, is equally

pertinent here and further discussion presenting our views

would only be a repetition of what we have already said.

The judgment of the court below will be reversed

and the cause remanded.


Reversed and remanded.

INTERMITTENT DISCHARGE

(Not to be reported in full.)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

755

194 I.A. 203

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

✓ Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 203

Turner

~~ERROR TO~~
APPEAL FROM

vs.

No. 50

October Term, 1914.

Billy COURT

Granite Billy COUNTY

Paige

TRIAL JUDGE

HON. *M. R. Sullivan*

Term No. 50.

Agenda No. 69.

October Term, 1914.

L. C. Turner,

Appellee,

vs.

M. E. Paige,

Appellant.

Appeal from
City Court of
Granite City.

Opinion by Higbee, J.

Action A.
~~This was a suit in assumpsit brought by appellee to~~ *& against*
~~recover damages for the failure of appellant to comply with~~ *the defendant*
~~the terms of an oral contract made by him to construct a house~~
~~for appellee.~~ *the plaintiff* Upon the trial the jury found the issues for
the plaintiff, *in the sum of* assessing his damages at \$180.00 *for which* and the court
gave judgment for that amount. *was given* *from the judgment entered*
the defendant offered.

1 No brief has been filed for appellee and under rule
37 of this court the judgment of the court below might be re-
versed pro forma. We have however examined the record and
reached the conclusion that the case should be reversed and
The evidence shows that when
reversed on its merits. After the house in question was sub-
stantially completed, appellee took possession thereof and
moved in. He claims however that appellant failed to install
a furnace, complete the back porch, tint the walls and ena-
el certain doors according to his agreement. Appellant claim-
ed that by agreement the furnace was omitted and that the
house was completed in accordance with the terms of the con-
tract. These questions were the subject of controversy in
the proofs but the weight of the evidence *the evidence appears to sustain*
supported the claim of the appellant; and

October Term, 1914.

Appeal from
City Court of
Greenville, S.C.

L. C. Turner,
Appellee,
vs.
M. F. Turner,
Appellant.

Opinion by Hibbs, J.

This was a suit in rem brought by appellee to recover damages for the failure of appellant to comply with the terms of an oral contract made by him to construct a house for appellee. Upon the trial the jury found the house for the plaintiff, assessed his damages at \$100.00 and the court gave judgment for that amount. The court has been filed for appellee and under rule 37 of this court the judgment of the court below might be reversed pro forma. We have however examined the record and reached the conclusion that the case should be reversed and remanded on its merits. After the house in question was substantially completed, appellee took possession thereof and moved in. He claims however that appellant failed to install a furnace, complete the back porch, tint the walls and enamel certain doors according to his agreement. Appellant claimed that by agreement the furnace was omitted and that the house was completed in accordance with the terms of the contract. These questions were the subject of controversy in the case but the weight of the evidence appeared to sustain

~~the claim of appellant.~~ Upon the trial the wife of appellee was permitted to testify and the court overruled the motion of Appellant to exclude her testimony upon the ground that she was an incompetent witness. The theory upon which she was permitted to testify was that she was acting as the agent of her husband in regard to the matters concerning which she spoke. An examination of her testimony however does not support the theory that she was acting as the agent of her husband in regard to the matters to which she testified. She was manifestly an incompetent witness under the statute and the court erred in permitting her to testify in the case.

~~Rev. Stat. chap. 51 sec. 5.~~

~~Should~~ Appellant testified that after the house had been ^{was} completed and appellee had moved in, they ^{parties} had an adjustment of their accounts and a full settlement; that he rendered his bill to appellee, which included certain extras, giving proper credits and the amount ^{+ appellee} ^{was} agreed upon ^{and} without trouble and for that amount, appellee ^{the appellant} gave him two notes which ^{are} were secured by a second mortgage on the property. Appellee ^{was given this} did not deny that there had been a settlement between him and appellant but on cross examination admitted that the settlement had taken place, that a balance had been struck between them as to what was due and that he had given the notes secured by the second mortgage in payment of the same. In his pleadings appellant had given notice under the general issue, that on the trial he would give in evidence in his defense, first that he had completed the contract according to the terms thereof and second that after the completion and full performance of the same, there had been a full and final settlement of the matters and things growing out of the contract

and that he had accepted appellee's notes in payment of the amount agreed upon between them as due him. Appellant having proved without contradiction that part of his defense which relied upon the settlement and which constituted a bar to appellee's rights of recovery, the verdict and judgment should have been in his favor.

The court instructed the jury ~~in the first instruction~~ given for appellee, that if they believed from all the evidence ^{that} appellant had failed to perform all or any part of his contract, if they found there was a contract and that appellee had suffered damages thereby, they should find the issues for the appellee. ~~This instruction directed a verdict and fell far short of stating all the things necessary to be included under such circumstances it being especially defective in failing to make any reference to appellant's defense of the settlement of accounts between him and appellee and should not have been given. For the reasons above mentioned the judgment in this case will be reversed and the cause remanded.~~

Reversed and remanded.

#####

(Not to be reported in full.)

and that he had accepted appellee's notes in payment of the
amount agreed upon between them as was held. Appellant had
not proved without contradiction that part of his defense
which relied upon the settlement and which constituted a bar
to appellee's right of recovery, the verdict and judgment
should have been in his favor.

The court instructed the jury in the first instanc-
tion given for appellee, that if they believed from all the
evidence appellant had failed to perform all or any part of
the contract, if they found there was a contract and that ap-
pellee had fulfilled his part thereof, then should find the
law for the appellee. This instruction directed a verdict
in favor of appellee if the jury believed from all the
evidence under such circumstances as to find appellee's defense
of the settlement of accounts between him and appellee
should not have been given. For the reasons above mentioned
the judgment in this case will be reversed and the case
remanded.

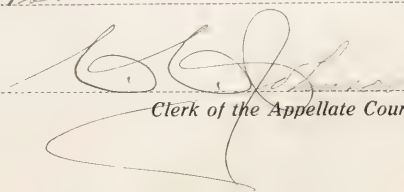
Reversed and remanded.

REVEREND

(Not to be reported in full.)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

4A 205

756

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

✓ Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 205

Beacon Falls Rubber
Shoe Co.

~~ERROR TO~~
APPEAL FROM

vs.

No.

57

October Term, 1914.

Circuit COURT

Effingham COUNTY

Granholm

TRIAL JUDGE

HON.

James C. McBride

Term No. 51.

Agenda No. 15.

October Term, 1914.

The Beacon Falls Rubber
Shoe Company,

Appellant,

vs.

T. S. Gravenhorst,

Appellee.

Appeal from Effingham.

Opinion by Higbee, J.

The declaration in this case is in assumpsit and contains only the common counts with an affidavit of merits. In addition to the usual statement of account sued on which accompanies the common counts, there is a statement setting forth the claim of \$53-0.28 for merchandise which the special memorandum attached thereto, shows to have been rubber boots and shoes claimed to have been sold by the Beacon Falls Rubber Shoe Company, Appellant, to T. S. Gravenhorst, appellee, upon which there was a credit given for goods returned of \$71.81, leaving a balance claimed to be due appellant of \$458.47. Appellee filed a plea of the general issue and the trial resulted in a verdict by the jury in favor of appellee and a judgment against appellant for costs.

Appellant introduced in evidence an order for goods which its counsel ~~said~~ constituted the contract of sale, on which the suit ^{was} predicated. This instrument purported to be an order taken by a salesman of appellant April 29, 1913, for the shipment of certain goods to appellee at Effingham, Illinois. It ^{was} ~~is~~ apparently an order blank of appellant filled

October Term, 1914.

Appeal from Ellingham.

The Bescon White Rubber
Shoe Company,
Appellant,
vs.
T. S. Gravenhorst,
Appellee.

Opinion by Higgins, J.

The declaration in this case is in substance and contains only the common counts with an affidavit of verity. In addition to the usual statement of account sued on which accompanies the common counts, there is a statement setting forth the claim of \$23-0-38 for merchandise which the appellant merchandise attached thereto, shows to have been rubber boots and shoes claimed to have been sold by the Bescon White Rubber Shoe Company, appellant, to T. S. Gravenhorst, appellee, upon which there was a credit given for goods returned of \$71.31, leaving a balance claimed to be due appellant of \$458.47. Appellee filed a plea of the general issue and the trial resulted in a verdict by the jury in favor of appellee and a judgment against appellant for costs.

Appellant introduced in evidence an order for goods which its counsel says constituted the contract of sale, on which the suit is predicated. This instrument purports to be an order taken by a salesman of appellant April 23, 1912, for the shipment of certain goods to appellee at Ellingham, Maine. It is substantially an order blank at appellee's office.

and signed
in by its sales man. At the top of the order ^{was} is the following:

NR "It being fully understood that in case of flood, fire, labor strikes or any other unavoidable casualty, we are not to be held responsible for the non-fulfilment of this order." At the bottom of the first page was the following: "Please note. This is a S. A. Sandal to fit the new low heel toe mens shoes. We overlooked it. If you don't want it please notify us."

It contained the following paragraph
Signed, "Adams." And then following, "As we are not jobbers and these goods are made up specially for you and delivered direct from the mill, no countermand can be accepted after the goods are in the works." This page ~~contained a list of certain goods and is~~ ^{was} followed by two other pages containing further lists of goods claimed to have been ordered by appellee.

On the third page ^{was} the following memorandum in pencil: "June 21, 1912. Trots not to make up or ship until further notice."

The name Adams on the purported order was that of J.J. Adams a salesman of appellant, who was a witness in its behalf upon the trial and who ~~claimed to have made the sale of the goods in question.~~ A copy of this order was sent to appellee by appellant a few days later and with it a letter which asked him to examine the duplicate and advise promptly if there were any errors or omissions. On the day the order was filled out, appellant agreed to take back certain goods sold to appellee on a former order amounting to \$95.91 and these goods were shipped back to appellant on April 25, 1912, but on account of delays in shipping, for which neither party was responsible, they were not delivered until the following July. The memoranda made by Mr. Adams when the order was given, were on slips of paper and no order at any time was signed by appellee. There was simply a verbal agreement between appellant's

in by the witness. It was the day of the order in the following:
"It being fully understood that in case of flood, fire,
Labor strikes or any other unavoidable casualty, we are not to
be held responsible for the non-fulfillment of this order." At
the bottom of the first page was the following: "Please note:
This is a B.L. Bondal to fit the new low heel toe and strap."
"I overlooked it. If you don't want it please notify me."
"And then following, "As we are not happy
and these goods are made up specially for you and delivered
direct from the mill, no discount can be accepted after the
goods are in the water." This page contained a list of con-
tain goods and is followed by two other pages containing the
their lists of goods and to have been ordered to arrive.
On the third page is the following: "On the 21st, 1912, I
The new Adams as the purported order was that of J.L. Adams
a witness of Adams, who was a witness in the default upon
the trial and who claimed to have made the sale of the goods
in question. A copy of this order was sent to appellee by
appellee a few days later and with it a letter which asked
him to examine the duplicate and advise promptly if there
were any errors or omissions. On the day the order was fill-
ed out, appellee agreed to take back certain goods sold to
appellee as a former order amounting to \$25.43 and these goods
were shipped back to appellee on April 25, 1912, but on no
account of delay in shipment, for which appellee paid the ex-
penses, they were not delivered until the following July.
The memoranda made by Mr. Adams when the order was given, were
on slips of paper and no order at all was signed by any
witness. There was simply a verbal agreement between appellee's

agent and appellee and appellee testified that the order was given conditionally, ^{and} ~~that is~~ that he was to have the right change or to/cancel it altogether if he desired, while Mr. Adams denied this statement. The goods were not to be delivered until in August, 1911, and prior to that time appellee ~~for seasons~~ ^{for seasons} satisfactory to himself; attempted to change the order or cancel part of it, as he claimed the right to do and there was considerable correspondence between the parties in reference to the matter, appellant refusing to concede that appellee had the privilege claimed by him. On June 21, appellee wrote to appellant not to make up his order until further notice and on August 2, appellant wrote appellee calling attention to the fact that it had written him three times with reference to his letter of June 21, and saying, "As more than a month has elapsed, it does not seem to us that we are proceeding with undue delay and we of course, would prefer to ship the goods with your consent, because unless we can have your cooperation, we cannot hope for a very large measure of success," On August 7, appellee wrote to appellant directing it to ship ~~five dozen pairs of rubber shoes~~ ^{five dozen pairs of rubber shoes} and cancel balance of order." On August 23, appellant wrote to appellee stating "we shall not accept the cancellation and have advised the mill to ship your order complete at once." Later on September 24, appellee wrote stating that he had received an invoice of rubber goods to his surprise, as on June 21, 1912, he had written not to make up or ship until further notice; that since then he had given notice to ship only five dozen and to cancel the balance of the order; that when the order was placed with ^{the mill in an} Mr. Adams, the latter was told distinctly the same was

agent and appellee had written testified that the order was given conditionally, that is that he was to have the right to cancel it if he desired, while Mr. Adams denied this statement. The goods were not to be delivered until in August, 1911, and prior to that time appellee had reserved the right to himself; attempted to change the order or cancel part of it, as he claimed the right to do and there was no considerable correspondence between the parties in reference to the matter, appellee testifies to Adams that appellee had the privilege claimed by him. On June 21, appellee wrote to appellant not to make up his order until further notice and on August 2, appellee wrote appellee calling attention to the fact that it had written him three times - the telephone to his father of June 21, and saying, "as soon as you can ship it, it does not seem to me that we are getting any more money out of it, would prefer to sell the goods with your consent," Adams denies that he had given notice of cancellation, he seems to have been very late in doing so, "On August 7, appellee wrote to appellant testifying to the fact that five boxes of rubber shoes and cancel balance of order." On August 23, appellant wrote to appellee stating "I shall not accept the cancellation and have advised the ship to ship your order unless it comes." Later on August 25, appellee wrote stating that he had received an invoice of five boxes to his surprise, as on June 21, 1911, he had written not to make up on ship until further notice, that since then he had given notice to ship only five dozen and to cancel the balance of the order; that when the order was placed with Mr. Adams, the latter was told distinctly the same was

conditional only and that he would probably cancel it, and notifying appellant that he would refuse to accept the goods upon arrival with the exception of the five dozen ordered shipped August 7. When the goods arrived appellee refused to receive them and this suit has followed.

When the order was given there were present, in addition to appellee and Mr. Adams, a salesman and employee of appellee named Everaman. The testimony of appellee and Everaman was to the effect that the order was only a conditional one, subject to change or cancellation, while this was denied by Adams. *The court instructed the jury in fact as follows* Whether or not there was any condition attached to the order or whether it was agreed that the same was to be given subject to the right of change or cancellation, were of course questions of fact for the jury. They evidently believed the testimony of appellee and Everaman as against that of Adams and their decision in that regard must, under the circumstances, be binding upon us. The contract in this case was an oral contract and it must be taken as proven that it carried with it the agreement of the parties that appellee should have the right to change or rescind the order. He chose to cancel all but a small portion of the order and when appellant refused to allow him to do this, insisting that he should take the whole order, he canceled his order and refused to receive any of the goods. We find nothing in the proofs tending to show that after the order was given appellee did anything to bar him from exercising his right to change or cancel the same and therefore, when he refused to receive the goods under the circumstances above set forth, he was acting within the power given him by the contract.

additional only and that he would probably cancel it, and
saying appellant that he would refuse to accept the goods
were returned with the exception of the five boxes retained
shipped August 7. Then the goods arrived appellant refused
to receive them and they were returned.
Then the order was given there were five boxes retained
to appellant and Mr. Adams, a salesman and appellant's
agent named Everman. The testimony of appellant and Everman
and as to the effect that the order was only a preliminary
one, subject to change or cancellation, while this was done
by Adams. There is no other evidence attached to
the order or whether it was agreed that the goods were to be
given subject to the right of change or cancellation, were
of course questions of fact for the jury. They evidently be-
lieved the testimony of appellant and Everman as against that
of Adams and their decision in that regard must, under the
circumstances, be binding upon us. The contract in this case
was an oral contract and it must be taken as proven that it
carried with it the agreement of the parties that appellant
should have the right to change or rescind the order. He
never so much as sent a small portion of the order and was
appellant refused to allow him to do this, insisting that he
should take the whole order, he cancelled his order and refused
to receive any of the goods. He finds nothing in the words
tending to show that after the order was given appellant did
anything to bar him from exercising his right to change or can-
cel the same and therefore, when he refused to receive the
goods under the circumstances above set forth, he was acting
within the power given him by the contract.

It is claimed however, that the court erred in its rulings in regard to the instructions. The first instruction offered by appellant told the jury if they believed appellant sold appellee the bill of goods to be delivered by freight at Effingham, that the goods were shipped to and arrived at Effingham, and that appellee was notified of their arrival, then appellant was entitled to recover the contract price of the goods notwithstanding appellee refused to accept the same and they are still in the possession of the railroad. This instruction was modified by the court by including in those things necessary for the jury to find to entitle appellant to recover, the further finding that "defendant did not reserve the right to cancel or change such bill and did not cancel or change the same." Appellee's defense was that under the contract he reserved the right to cancel or change the bill and that he in fact did so. The instruction as ~~given~~^{ignored} this defense and under it appellant would have been entitled to recover, even though the right of appellee to change or cancel the bill was duly proven. Therefore the modification was necessary. The modifications complained of in other instructions are of similar import but appear to have rendered them clearer and more certain.

The first instruction given for appellee told the jury that, "the plaintiff cannot recover under the declaration in this case, unless it has shown by a preponderance of all the evidence in the case a contract fully performed on its part," and the complaint of appellant is that it left out a material element of the case, which was that defendant refused to accept.

It is claimed, however, that the court erred in its findings in regard to the instructions. The first instruction offered by appellant told the jury if they believed appellant sold appellee the bill of goods to be delivered to William H. Hiltzman, that the goods were shipped to and arrived at Hiltzman, and that appellee was notified of said arrival, and that appellee was entitled to recover the contract price of the goods notwithstanding appellee refused to accept the same and they are still in the possession of the railroad. This instruction was modified by the court by including in those three words "any time the jury so finds" and the court refused to receive the further finding that "defendant did not receive the right to cancel or change said bill and did not cancel or change the same." Appellee's defense was that under the contract he received the right to cancel or change the bill and that he did not do so. The instruction as given excluded this defense and under it appellant would have been entitled to recover, even though the right of appellee to change or cancel the bill was duly proven. Therefore the modification was necessary. The modifications complained of in other instructions are of similar import but appear to have rendered them clearer and more certain.

The first instruction given for appellee reads that "the plaintiff cannot recover under the bill of lading in this case, unless it has shown by a preponderance of all the evidence in the case a contract fully performed on its part," and the complaint of appellant is that it left out a material element of the case, which was that defendant refused to accept.

This objection does not appear to us to be well founded as there was no question but that appellee did refuse to accept the goods and he admitted that he did so. The complaint of the third, fourth and sixth instructions given for appellee, is that they violate the rule that all conversations or negotiations had either before or at the time a contract is made, are presumed to be embodied in the written contract and unless the reservation of the right to cancel was inserted in the written contract in question, the statement of defendant that he reserved the right to cancel, even if made, was immaterial and irrelevant. As we have above said, however, the contract in this case must be considered as an oral contract and consequently all the conversations of the parties relative to the making of the same were proper and the instructions recognizing this fact, were not erroneous.

It is a matter to be noted also that several of the instructions given by appellant itself, were based upon the theory that the contract was in fact an oral contract. Upon the whole case, it appears to us substantial justice has been done and the judgment of the court below will be affirmed.

Judgment affirmed.

This cause having been tried in the court below by Mr. Justice McBride of this court, he took no part in the hearing here.

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(Not to be reported in full.)

This objection does not appear to us to be well founded as there was no question but that appellee did refuse to accept the goods and he admitted that he did so. The complaint of the third, fourth and sixth instructions given for appellee, is that they violate the rule that all instructions be correct and proper and either before or at the time a verdict is rendered are presumed to be embodied in the written contract and unless the reservation of the right to cancel was inserted in the written contract in question, the statement of defendant that he reserved the right to cancel, even if made, was immaterial and irrelevant. As we have above said, however, the contract in this case must be considered as an oral contract and consequently all the conversations of the parties relative to the making of the same were proper and the instructions recognizing this fact, were not erroneous.

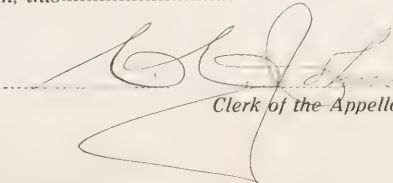
It is a matter to be noted also that several of the instructions given by appellant itself, were based upon the theory that the contract was in fact an oral contract. Upon the whole case, it appears to us substantial justice has been done and the judgment of the court below will be affirmed.

This cause having been tried in the court below by Mr. Justice McBride of this court, he has no part in the hearing here.

(Not to be reported in full.)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

94 A 240

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

✓ Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 240

ERROR TO-
APPEAL FROM

Simon Adams

vs.

No. 74

October Term, 1914.

Circuit COURT

Marion COUNTY

Smith

TRIAL JUDGE

HON. *Albert M. Rose*

October Term, 1914.

W. J. Simer, Administrator,
etc.,

vs. Appellee,

Earl Hults,

Appellant.

Appeal from Marion.

Opinion by Higbee, J.

Action &
 Appellee brought suit in replevin against appel-
 lant in the circuit court of Marion county, and in executing
 the writ the officer took possession of two stallions, two
 mares with colts, a jack, six hundred bushels of corn, ten
 tons of hay, and some farming implements then in the posses-
 sion of appellant. In the pleadings and on the trial, appel-
 lant claimed ^{to have} right of possession to the property as the own-
 er thereof and the only question of fact involved was whether
 or not appellant had purchased the ^{property} from Charles W.

Simer, appellee's intestate in his life time. *the property*
^{in dispute consisting of ten acre farming tract near}
 Charles W. Simer owned a farm in Omega township in
 said county, but some two or three years prior to his death
 had moved to a ten acre tract of land near the village of
 Omega, where he kept a breeding barn. During nearly all the
 time he lived on the ten acre tract, appellant, who was his
 wife's brother, and was an unmarried man, lived with him and
 they farmed and worked together. ^{it's deacon} On the trial appellant, to
 establish his ownership of the property, ^{tried} attempted to show
 that from time to time, Charles W. Simer had borrowed differ-
 ent sums of money from him, and given notes therefor; that on
 July 16, 1910, the total amount of these notes was \$1,950.00

UNRECORDED COPY, 1911.

Agreed from Motion.

J. J. Simer, Administrator.

Appellee,

vs.

Earl Hulse,

Appellant.

Opinion by Hibbes, J.

Appellee brought suit in replevin against appellant.

First to the circuit court of Marion county, and is now pending in the circuit court of Marion county.

The first two original writs of replevin were issued by the circuit court of Marion county.

Writs with return, return, six hundred bushels of corn, ten

tons of hay, and some farming implements then in the possession of appellant.

In the meantime, and on the trial, appellant claimed right of possession to the property as the owner.

It is shown that the only evidence of title in favor of appellant is that he purchased the property from Charles Simer, appellee's intestate, in his life time.

Charles Simer owned a farm in Omega township in this county, and was one of the best farmers in the county.

He had moved to a ten-acre tract of land near the village of Omega, where he kept a breeding barn. During nearly all the time he lived on the ten-acre tract, he was one of the best farmers in the county.

Charles Simer, appellee's brother, and was an unmarried man, lived with him and they farmed and worked together. On the trial, appellant attempted to establish his ownership of the property, and to show that from time to time, Charles Simer had borrowed different sums of money from him, and given notes therefor; that on July 16, 1910, the total amount of these notes was \$1,320.00.

and one note was then given by Simer for the whole amount due; that afterwards Simer borrowed an additional amount and gave appellant a note for \$335.00; that in the fall of 1911, after the large note was due, deceased sold and transferred the property in question to appellant and in payment therefor, appellant delivered up to him the \$1,850.00 note; that thereafter and until the death of Mr. Simer, appellant lived with him and held possession of the property on the premises. ~~Charles~~ Simer died January 11, 1913, and his father, F. J. Simer, was appointed administrator of the estate. The property in dispute was not inventoried by the administrator, nor does it appear to have been claimed by him as part of the estate until August, 1913, about the time this suit in replevin was brought.

~~The verdict and judgment in this suit was in favor~~ of the plaintiff below and appellant urges four reasons in this court why the judgment should be reversed. They are, (1) that the court erred in refusing to admit testimony offered on behalf of appellant; (2) that the evidence does not support the verdict and judgment; (3) that the court erred in giving instruction No. 4 on behalf of appellant; and (4) that the trial court made improper remarks in the presence of the jury concerning a disputed question of evidence. We will not discuss the question of the weight of the evidence or its sufficiency to sustain the verdict, for the reason that the judgment must be reversed for other reasons, and the case may be ~~again presented to a jury.~~

In his effort to establish title to the property in question in the manner claimed by him as above suggested, appellant attempted to prove the existence of said ^{note} note for \$1850. and to that end offered in evidence the testimony of his brother

and one note was then given by Elmer for the whole amount due; and afterwards Elmer borrowed an additional amount and gave appellant a note for \$385.00; that in the fall of 1911, after the large note was due, deceased sold and transferred the property in question to appellant and in payment thereof, appellant delivered up to him the \$1,280.00 note; that thereafter and until the death of Mr. Elmer, appellant lived with him and held possession of the property on the premises. Appellant was appointed administrator of the estate. The property in dispute was not inventoried by the administrator, nor does it appear to have been claimed by him as part of the estate until August, 1913, about the time this suit in replevin was brought. The verdict and judgment in this suit was in favor of the plaintiff below and appellant urges four reasons in this court why the judgment should be reversed. They are, (1) that the court erred in refusing to admit testimony offered on behalf of appellant; (2) that the evidence does not support the verdict and judgment; (3) that the court erred in giving Instruction No. 2 on behalf of appellant; and (4) that the trial court made improper remarks in the presence of the jury concerning a disputed question of evidence. We will not discuss the question of the weight of the evidence or the sufficiency to sustain the verdict, for the reason that the judgment must be reversed for other reasons, and the case may be again presented to the jury.

It is also suggested that the plaintiff attempted to prove the existence of said note for \$1,280.00 and that and offered in evidence the testimony of his brother

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er ~~Hilmer Hults~~ and the life of the letter, to the effect that a note for that amount, signed by the deceased, payable to appellant, was left by appellant in their possession in 1911, and that afterwards during the life time of ~~Charles W.~~, Biser, appellant came and got the note; that the note was attached to a stub which was introduced in evidence and that the stub bore a correct description of the note left in their possession and later taken away by appellant. ~~The court however,~~
~~refused to hear this evidence unless it should be first shown~~
that the note was not in appellant's possession. Appellant then offered to testify himself that he had not the note in his possession since the death of ~~Charles W.~~, Biser but the court refused ~~to~~ to admit his testimony on the ground that he was not a competent witness against appellee, who was suing as administrator. While appellant was not competent as a witness generally, in the action brought by the administrator, under the second section of our statute on evidence and depositions, yet it is expressly provided in the first exception to said section that "A party or interested person may testify to facts accruing after the death of such deceased person" and this statutory right is fully recognized by our supreme court. *Hilt v. Heinberger*, 235 Ill. 335. *Merchants Loan & Trust Co. v. Egan*, 222 Ill. 294. All that appellant was attempting to do was to testify as to facts occurring after the death of ~~Charles W.~~, Biser and the fact that his testimony might have some bearing upon the conditions existing before the death, should not have prevented him from obtaining the benefit of the testimony he was entitled to under the statute. In refusing to permit appellant to give this testimony concerning facts as they existed after the death of the

at first, and the wife of the latter, to the effect that
 the note for that amount, signed by the deceased, payable to
 appellant, was left by appellant in their possession in 1911,
 and that afterwards during the life time of Charles W. Simer,
 appellant came and got the note; that the note was attached
 to a stub which was introduced in evidence and that the stub
 bore a correct description of the note left in their posses-
 sion and later taken away by appellant. The court, however,
 refused to hear this evidence unless it should be first shown
 that the note was not in appellant's possession. Appellant
 then offered to testify himself that he had not the note in
 his possession since the death of Charles W. Simer but the
 court refused want to admit his testimony on the ground that
 he was not a competent witness against appellee, who was an-
 nounced as administrator. "While appellant was not competent as
 a witness generally, in the action brought by the adminis-
 trator, under the second section of our statute on evidence
 and depositions, yet it is expressly provided in the first
 section to said section that 'a party or interested person
 may testify to facts occurring after the death of such deceased
 person' and this statutory right is fully recognized by our
 supreme court. *Hilt v. Helmberger*, 233 Ill. 385. *Merchants*
Loan & Trust Co. v. Egan, 233 Ill. 384. All that appellant
 was attempting to do was to testify as to facts occurring af-
 ter the death of Charles W. Simer and the fact that his testi-
 mony might have some bearing upon the conditions existing be-
 fore the death, should not have prevented him from testifying
 the benefit of the testimony he was entitled to under the
 statute. In refusing to permit appellant to give this tes-
 timony concerning facts as they existed after the death of the

intestate, the court committed a material error. We think also that in this connection the testimony of Elmer Hulte and his wife, bearing upon the question of the existence of the note, ~~was competent~~ and should have been admitted.

^{an}
The ~~fourth~~ instruction given for appellee told the jury "If you believe from the evidence in this case that Charles W. Simer, the plaintiff's intestate, had in his life time purchased or raised or became the owner of the property in question and if you further believe from the evidence that he had the property in question in his possession at the time of his death, then such possession is prima facie evidence of the title of the property in Charles W. Harris Simer at the time of his death and in his administrator after his death." ~~This did not state the law applicable to this case correctly as~~ possession of property is not in cases of this kind prima facie evidence of ownership. In *McElhannon v. McFerron* 36 Ill. App. 22, which was a replevin suit this court said, "Defendants second instruction informed the jury 'that possession is prima facie evidence of ownership and that defendant being in possession of the property in dispute at the time of the commencement of this suit is presumed to be the owner.' This instruction was clearly wrong. It does not follow because defendant was in possession of the property at the time suit was commenced and after demand for and refusal to deliver possession to the plaintiff that such possession by defendant furnished, even prima facie, evidence of ownership in him much less would it compel or require the jury to presume as a matter of law defendant was then the owner." We think the rule laid down in the above case is correct and that the instruction given in the case we are considering falls within

instruction, the court admitted a material error. We think
that in this connection the testimony of James H. Hulse and
the wife, bearing upon the question of the existence of the
title, was competent and should have been admitted.
The fourth instruction given for appellate review reads
"If you believe from the evidence in this case that Charles
H. Hulse, the plaintiff's interest, had in his life time
acquired or raised or passed the deed of the property in ques-
tion and if you further believe from the evidence that he had
the property in question in his possession at the time of his
death, then such possession is prima facie evidence of the
title of the property in Charles H. Hulse, Hulse and the wife
of his death and in his estate." This instruction is
not correct. The instruction is in error because
possession of property is not in cases of this kind prima
facie evidence of ownership. In *Wheeler v. Wheeler*, 22 Ill.
App. 32, which was a partition suit, this court said, "De-
fendant's actual possession of the property is prima facie evi-
dence of ownership and that defendant
being in possession of the property at the time of
the commencement of this suit is presumed to be the owner."
This instruction was clearly wrong. It does not follow that
because defendant was in possession of the property at the time
suit was commenced and after demand for and refusal to relin-
quish possession to the plaintiff that such possession by de-
fendant furnished, even prima facie, evidence of ownership in
him. Much less would it compel the jury to presume
as a matter of law defendant was the owner. We think
the rule laid down in the above case is correct and that the
instruction given in the case is erroneous and should be

it, notwithstanding the fact that reference is made to the instruction in this case to the former ownership by Charles W. Simer of the property in question. The instruction as given must necessarily have misled the jury into believing that the mere possession of the property by the intestate at the time of his death was prima facie evidence of his ownership of or title to the property.

The complaint made of improper remarks by the court in the presence of the jury relate to a statement made by the court that a condition existed which was really a question of fact for the jury to determine. The statement was not so material as to have warranted a reversal of the case on that account and was no doubt a mere inadvertence which would not occur on another trial. For the reasons above given however, the judgment in this case will be reversed and the cause remanded.

Reversed and remanded.

(Not to be reported in full.)

It notwithstanding the fact that reference is made in the
question to this case as the latest opportunity to clarify
the issue of the property in question. The question is
given must necessarily have asked the jury into believing
that the mere possession of the property by the defendant at
the time of his death was not the evidence of the owner-
ship of or title to the property.

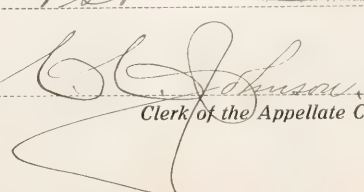
The complaint was of improper remarks by the court
in the presence of the jury made to a statement made by the
state that a condition existed which was really a question of
fact for the jury to determine. The statement was not so
various as to have warranted a reversal of the case on that
ground and was not a mere inadvertence which would not
warrant a reversal. For the reasons given however,
the judgment in this case is reversed and the case is
remanded.

Reversed and remanded.

(Not to be reported in full.)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

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194 I.A. 243

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

✓ Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 1st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 243

~~ERROR TO~~
APPEAL FROM

vs.

No. 76

October Term, 1914.

Circuit COURT

Marion COUNTY

TRIAL JUDGE

HON.

Thomas M. Harris



Term No. 76.

Agenda No. 63.

October Term, 1914.

James R. Brown,
Appellee,

vs.

Frank Leppo et al.,
Appellants.

Action brought by
appellant, and when to
Appeal from Marion.

Opinion by Higbee, J.

Appellants by this appeal seek to reverse a judgment against them for \$300.00 recovered by appellee in a suit in case, for damages to real estate claimed by appellee to have been caused by the wrongful and negligent acts of ^{the defendant} appellants. The ^{and time} ~~proofs in the case~~ showed that James R. Brown, the appellee, owned a forty-acre tract of land in Marion County, Illinois, adjoining which on the south is another forty-acre tract called the Finty forty. There ~~was a road running between the two tracts~~ and the Finty land was covered with heavy timber while appellee's forty was practically clear and prior to 1909 had been at times in cultivation. ^{That} A creek known as Skillet Fork ran through both tracts of land, ^{entering} ~~entering~~ near the north-east corner of the north tract and passing in a south-easterly direction to the Finty forty, which it entered at a point near the center of the east and west line on the north side thereof. At times the creek overflowed its banks and injured the crops on appellee's land. ^{That} In the spring of 1908 Frank Leppo and Asher R. Cox purchased the timber on the Finty land ^{with} and the right to remove the same and in the fall

October Term, 1914.

James H. Brown, et al.

James H. Brown, et al.
Appellants
vs.
Frank Lappo, et al.
Appellees

James H. Brown, et al.
Appellants
vs.
Frank Lappo, et al.
Appellees

Opinion by Mr. Justice.

Appellants by this appeal seek to reverse a judgment against them for \$300.00 recovered by appellees in a suit in equity for damages to real estate claimed by appellees to have been caused by the wrongful and negligent acts of appellees. The record in the case shows that James H. Brown, the appellee, owned a forty-acre tract of land in Marion County, Indiana, adjoining which on the south was another forty-acre tract called the Fifty Forty. There was a road running between the two tracts and the Fifty land was covered with heavy timber. Appellee's forty-acre tract was formerly a part of or to 1903 had been at times in cultivation. A creek known as Skiffet Fork ran through both tracts of land, entering near the north-east corner of the north tract and passing in a westerly direction to the Fifty Forty, where it entered at a point near the center of the east and west line on the north side thereof. At times the creek overflowed its banks and injured the crops on appellee's land. In the spring of 1909 Frank Lappo and Asher H. Cox purchased the timber on the Fifty land and the right to remove the same and in the fall

of that year commenced cutting ^{it} ~~the same~~ and making it up into
saw timber, railroad ties, and other timbers ^{men he engaged for} and continued for
several years to cut the timber and remove it. ^{That} In ac-
complishing ^{the} this work a number of persons were employed by appel-
lants and the work was to some extent divided up. That is
one man or set of men undertook the cutting of the timber and
worked it up into ties for which they were paid so much a tie.
Others cut the saw timber, the contract being to cut the trees
down and to cut them up into saw logs for which they were to
be paid so much per thousand feet log measure, and other men
were engaged to do the hauling of the saw logs from the place
where they were cut into timber, to a saw mill located near
at hand. ^{That} In the prosecution of the work, trees were cut and
permitted to fall into the creek and large tops, limbs and
other debris from the cutting was also permitted to fall into
the creek, in consequence of which drifts and dams were form-
ed which obstructed the flow of the water. ^{That} It was shown by
~~witnesses for appellee~~ that while drifts at times prior to
this had occasionally formed in or across the creek, ^{but} they
were but temporary, as the floods or freshets washed them out
and left the stream clear of obstruction; ^{that} also that while the
water in flood time formerly went out over ^{the} parts of appellee's
land it soon passed off down the creek doing little injury, but
that since the brush and tops from the trees were thrown into
the creek in the carrying on of appellants' work, the drifts
became permanent, that the creek was at some places complete-
ly filled up and ^{that} the heavy rains could not remove the obstruc-
tions; that such heavy obstructions remained from year to year
causing the water to spread out over appellee's tract of land,
so that in places where he was accustomed to raise crops it

of that year commenced cutting the same and making it up into
new timber, railroad ties and other slabs and sections for
several years to cut the timber and remove it. In 1900
clearing the work a number of persons were employed at different
times and the work was to some extent divided up. That is
one man or set of men undertook the cutting of the timber and
others cut the new timber, the others being engaged in
down and so on then up again and so on which they were to
be paid so much per thousand feet log measure and other men
were engaged to do the hauling of the new logs from the place
where they were cut. In the prosecution of the work, trees were cut and
at hand. In the prosecution of the work, trees were cut and
permitted to fall into the creek and large logs, limbs and
other debris from the cutting was also permitted to fall into
the creek, in consequence of which drifts and dams were formed
which obstructed the flow of the water. It was known by
experience that while drifts at times prior to
floods and occasionally formed in or across the stream, they
were but temporary, as the floods or freshets washed them out
and left the stream clear of obstruction. It was that while the
water in flood time formerly went out over banks of adjacent
land it soon passed off down the creek doing little injury, but
that since the brush and logs from the trees were thrown into
the creek in the carrying on of agricultural work, the drifts
became permanent, and the water got at some times so high
as to fill up and the heavy rains could not remove the obstructions;
that such heavy obstructions remained from year to year
causing the water to spread out over appellee's tract of land,
so that in places where he was accustomed to raise crops it

was now difficult to grow a crop and save it; that one year a matured oats crop and a growing corn crop were ruined and subsequently other crops were damaged; that some two or three acres were damaged by cakes of ice, which were pushed out over it causing the soil to be afterwards removed.

Appellants contend that the evidence does not show that appellee was injured by the things complained of, that the court gave incorrect instructions for appellee and refused correct ones offered by appellants and that the amount of the verdict is excessive. There was no serious contradiction that the tree tops and limbs complained of went into the creek and formed drifts and it plainly appeared that these obstructions in the creek and the consequent stoppage of the flow of the water, did injury to appellee's premises. There was conflicting evidence however as to the extent to which appellee's land was injured. The jury which heard the case gave a verdict in favor of appellee for \$400.00 but after the argument of the motion for a new trial a remittitur was entered by appellee for \$100.00. There was proof to sustain the amount of damages allowed appellee and it does not appear to us that the judgment entered for the amount remaining after the remittitur was entered, was excessive.

Appellants complain that a ~~peremptory~~ peremptory instruction offered by them at the close of plaintiff's evidence and renewed at the close of all the evidence to find the defendant not guilty, should have been given because the evidence disclosed that the persons cutting the timber were independent contractors and the doctrine respondent superior therefore did not apply, but this contention does not appear to us to be well founded. The evidence showed that different men were

... difficult to grow a crop and save it; that one year
a natural state crop and a growing corn crop were ruined and
substantially other crops were damaged; that some two or three
times were damaged by cakes of ice, which were washed out over
it causing the soil to be afterwards removed.

Appellants contend that the evidence does not show
that appellee was injured by the things complained of, that
the court gave incorrect instructions for appellee and refuse
to set aside the verdict offered by appellee and that the amount of
the verdict is excessive. There is no serious contradiction
that the fire took place in the building of which the party
and formed drifts and it plainly appeared that these obstruc-
tions in the creek and the consequent stoppage of the flow of
the water, did injury to appellee's premises. There are con-
flicting evidence however as to the extent to which appellee's
land was injured. The jury found that the damage done was less
than in favor of appellee for \$400.00 but after the argument
of the motion for a new trial a remittitur was entered by the
court for \$100.00. There was great evidence to the contrary of
the amount allowed appellee and it does not appear to us that
the judgment entered for the amount remaining after the re-
mittitur was entered, was excessive.

Appellants complain that a general peremptory instruc-
tion offered by them at the close of plaintiff's evidence and
renewed at the close of all the evidence to find the defendant
not guilty, should have been given because the evidence dis-
closed that the persons cutting the timber were independent
contractors and the defendant was not liable for their acts.
This contention does not appear to us to be
well founded. The evidence showed that defendant was not

employed at different times during the period the work was progressing, to cut the timber and that they were paid therefor by the tie or the thousand feet. No definite quantity or proportion of the whole amount was agreed to be done by the men engaged in the work nor was the employment for any definite length of time. Appellant Lerro stated in his testimony "I simply had some men go there and cut the timber by the thousand feet, I went out there occasionally to see what they were doing and to see how they were cutting it. I gave them instructions from time to time when I was there what I wanted them to do; just like I would any other men who were working for me." A great deal has been written upon the doctrine of respondent superior, including therein the constantly recurring question of what constitutes an independent contractor and appellants have cited a number of authorities upon these questions in their comprehensive brief, upon this subject. In *Harding v. St. Louis Stock Yards*, 342 Ill. 444, where the doctrine of respondent superior was under discussion, it was said "No absolute or arbitrary rule can be laid down by which it can be plainly seen in every case whether a person is the servant of the general or special master as these terms are used in decisions. The special facts of each case must be looked to in order to reach the proper conclusion." We conclude from a consideration of the evidence in this case that the services rendered by the several persons in cutting timber for appellants, were not of such a character as would constitute them independent contractors to such an extent as to relieve appellants from responsibility for their negligent acts. Appellants further complain of the second and fourth instructions given for appellee because it is said they assume

...of the period the work was
...to out the ... and that they were paid there-
...the ... the ... No definite quantity
...of the whole amount was agreed to be done by
...the men engaged in the work nor was the employment for any
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...In Harding v. St. Louis Stock Yards, 242 Ill. 444, where
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...which it can be plainly seen in every case whether a person
...is the servant of the general or special master or these terms
...are used in decisions. The special facts of each case must
...be looked to in order to reach the proper conclusion." ...
...conclude from a consideration of the evidence in this case
...that the services rendered by the several persons in cutting
...timber for appellants, were not of such a character as would
...constitute them independent contractors to such an extent as
...to relieve appellants from responsibility for their negligent
...acts. Appellants further complain of the second and fourth
...instructions given for appellees because it is said they assume

the men who cut the tree tops and deposited the same, with brush and timber, in the stream were servants or employees of appellants. An examination of these instructions show that they are not properly subject to this criticism as they do not appear to make the assumption of facts complained of but make those questions conditional upon what the jury find from the evidence in the case. Appellants' refused instructions Numbers one and two both told the jury that appellee had a right to require the owner of the real estate upon which the drifts were formed to remove the same so as not to obstruct the flow of water, and instruction No. one further stated that if the jury believed from the evidence that appellee did not take steps to compel the owner to remove the drifts and that such failure on the part of appellee was negligence and contributed to the injury and damages to his land, appellee could not recover for any damages occasioned in whole or in part by such negligence. These instructions raised a false issue not pertinent to this case, which could have only resulted in misleading the jury and were properly refused. Appellants further complain that the court refused their instruction No. six which stated that "before the plaintiff can recover in this case it must appear from the evidence that the defendants had notice or knowledge of the formation of said drifts prior to the beginning of this suit." In support of their claim that this instruction should have been given, appellants cite *Groff v. Ankenbrandt*, 124 Ill. 51, where it is said to be a rule, that to hold a defendant liable for the continuance of a nuisance erected by another on his land there must be generally a request or notice to him to remove the same. That doctrine might be applied in case appellee here

and that the logs and deposited the same, with
logs and timber, in the stream, were servants or employees of
appellee. In execution of these instructions the logs
they are not properly subject to this action as they are
not subject to move the respondent at large remained of and
were those questions which should have been left to the jury
from the evidence in this case. Appellee's evidence
Tina Roberts and the logs were the logs that appellee
had a right to remove the logs of the said debris upon which
the drifts were found to remove the same and as not to obstruct
the flow of water, and instruction No. one further stated
that if the jury believed from the evidence that appellee did
not take steps to compel the owner to remove the drifts and
that such failure on the part of appellee was negligence and
contributed to the injury and damages to his land, appellee
could not recover for any damages occasioned in whole or in
part by such negligence. These instructions raised a false
issue not pertinent to this case, which could have only re-
sulted in defeating the jury without prejudice to the
plaintiff further complain that the court refused their in-
struction No. six which stated that "before the plaintiff can
recover in this case it must appear from the evidence that the
defendants had notice or knowledge of the formation of said
drifts prior to the beginning of this suit." In support of
their claim that this instruction should have been given, ap-
pellants cite *Groff v. Ankenbrandt*, 122 Ill. 51, where it is
said by the court, that to bind a defendant to the
continuance of a nuisance erected by another on his land there
must be generally a request or notice to him to remove the
same. That doctrine might be applied in case appellee here

was suing the owner of the land for permitting the obstructions complained of to remain in the stream, but the suit here is not against the owner but against the persons who had themselves placed or caused to be placed the obstructions which caused the injury to appellee in the stream and therefore the instruction offered was not applicable to the case and the court did not err in refusing it. The judgment in this case being based upon the evidence and not excessive in amount, and there having been no material error committed by the court in the conduct of the trial, should be, and is affirmed.

Judgment affirmed.

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(Not to be reported in full.)

the court at the trial, should be, and is allowed.

There being then no material error committed by the court in being based upon the evidence and not necessary in account, and court did not err in refusing it. The judgment in this case

Instruction offered was not applicable to the case and the caused the injury to appellee in the stream and therefore the believe aimed or caused to be placed the question of which is not against the owner but against the persons who run them - those complained of to remain in the stream, but the suit here - the suit was at all the land for permitting the co-owners -

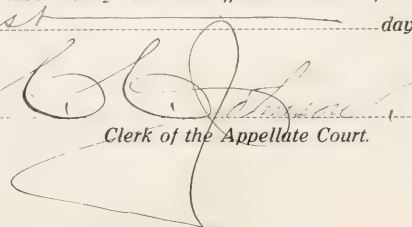
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THE UNIVERSITY OF CHICAGO

(Not to be recycled or sold)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1915.


Clerk of the Appellate Court.

HA 260

765

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

Hon. Harry Higbee, Justice.

✓ Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 21st day of July A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Kirsch, et al.,

Appellants.

vs.

No. 38

October Term, 1914.

Soucy,

Appellee.

194 I.A. 260

~~ERROR~~
APPEAL FROM

CITY COURT

EAST ST. LOUIS COUNTY

TRIAL JUDGE

HON. ROBERT H. FLANNIGAN.

In the Appellate Court
Of The State of Illinois,
Fourth District.
October Term A. D. 1914.

Francis and Mamie Kirsch, :

Appellants. :

vs. :

Prosper J. Soucy, :

Appellee. :

Appeal from City Court

East St. Louis, Illinois.

Action by against
for rent.

McBride, P. J.

The appellee recovered judgment in the Court
for sixty-six (\$66.00) Dollars, *from which the*
plaintiff appeals.
which the appellants prosecute this appeal. There
is no dispute in this case that the amount of rent due
to the appellee was One Hundred Two (\$102.00) Dollars,
and accrued in the following manner; *The evidence shows that*
Prior to the month
of September 1906, house number 1135 College Avenue,
East St. Louis, Illinois, *the* had been in possession of one
Abbott, *the* his collectors of rent, were E. Artman and Whitney.
During the latter part of September 1906, because
of litigation (the nature of which is not disclosed by
the record) the property *passed* into the control of the
plaintiff, *and* Prosper J. Soucy, and has so continued until
the present time, *that* under a trust deed
the The Defendants Kirsch *the* were occupying the prop-
erty at the time it came into possession of Soucy as
stated, and they had paid rent to Abbott, and to his

collectors, at the rate of thirty dollars per month. They continued to occupy the property without any new arrangement with Soucy until the 4th day of January, 1907, at which time, a new house built by the defendants being ready, ^{when} they moved out of 1135 Collis Avenue, and surrendered the key to the defendant Soucy. So far as the record discloses, they were, and had been for some time, tenants of the property, from month to month at a monthly rental of thirty dollars.

^{further} It appeared ^a from the evidence that the sewer between that and a neighboring house, both of which emptied into a cesspool, was broken, and that the sewage rose into the yard and ran back into the cellar of the house occupied by Kirsch; that Kirsch complained to Whitney (Abbott's Collector) and Whitney said, "I only collect the rent for myself until the money that Mr. Abbott owes me is paid." ~~Whether or not Kirsch told his rent was not paid.~~ ^{That} ~~Then Kirsch~~ went to Soucy thinking he was the owner and told him of the condition, also of other conditions of the house, showing it to be in a bad state of repair, and Soucy told him he had nothing to do with the house except to collect rent, that he did not know who the owner was. Kirsch then ^{made the} ~~bought a faucet~~ ^{necessary repairs at his own expense} from Soucy (who is in the plumbing business) and fixed the hydrant himself; Kirsch then complained to McBrien, the health commissioner, and to the mayor of the city; defendants used Chloride of Lime and other disinfectants and tried to find another house into which to move but were unsuccessful. In October when they went to start a fire in the furnace they found a broken grate; they

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told Soucy about it, and he said, "I can't do anything for you". Defendants had a hardware man fix it and also had the flue, which had been burned out, fixed; and later discovered a hole in the cast iron of the furnace. They called in a hardware man, who said the furnace was burned out and there was no use to try to fix it, but he and defendants put a brick over the hole and some clay around it and tried to run the furnace in that manner, and so continued to occupy the house until the 4th day of January 1907, when their new house being completed they moved into it. Prior to the time that Soucy began collecting the rent there had been a storm, which blew off some of the shingles of the house and caused it to leak badly and damaged the carpet and curtains of the appellants. It appears from the testimony that appellants occupied the house for three months and eighteen days after it came into the control of Soucy.

~~It is also~~ ^{and also} contended by the appellants ^{what} that when they went to surrender the key ~~to~~. Soucy agreed, on account of the damage done, to release the rent then owing by appellants. This, however, ~~was~~ ^{was} denied by Mr. Soucy.

It ~~is~~ ^{was} contended by the appellants that there was an agreement upon the part of the landlord Abbott to keep the house in repair; ~~and the jury seem to have determined by their verdict. The amount of rent that had accrued, which is not in dispute, was one hundred two dollars, and the jury appear to have deducted thirty-six dollars from this amount, and gave a verdict~~

~~for sixty-six dollars, and we must conclude that the~~
~~thirty-six dollars was the amount of damages that the~~
~~jury ascertained and determined that appellants had~~
~~sustained.~~

It is contended, however, by appellants that the plaintiff and defendants compromised the demand for rent by setting off the damages against the rent which appellants claim was due at the time of the surrendering of the key to the house, but appellee denies that he ever compromised the rent, or in any manner released appellants from payment of rent, and the jury by a special finding determined that no compromise had been made of this matter, and we cannot say from the evidence that such finding was not warranted. The fact was disputed and the evidence of appellants upon this question is not very satisfactory, so we cannot disturb the finding of the jury upon this account.

It is next contended that appellee's instructions numbered 3, 5 and 6 were improper because they told the jury that "unless you believe from the evidence that the plaintiff Soucy contracted and agreed with the defendants to keep the house in repair the verdict should be for the plaintiff." It will be observed that the expression referred to is preceded by a statement of the law that "The landlord is not required by law to make repairs on property leased by him to a tenant unless he has agreed so to do as a part of the leasing." If the appellants were holding by virtue of a leasing, implied or otherwise, from Soucy then these instructions were accurate. Counsel for appellee contends that Soucy was merely a tenant from month to month, and that appellants were the

...the ...
...the ...
...the ...

It is contended, however, by appellants that the plaintiff and defendant compromised the demand for rent by settling all the issues against the rent which appellants claim was due at the time of the surrendering of the key to the house, but appellee also that he ever compromised the rent, or in any manner released appellants from payment of rent, and the jury by a special finding determined that no compromise had been made of this latter, and we cannot say from the evidence that such finding was not warranted. The fact was disputed and the evidence of appellants upon this question is not very satisfactory, so we cannot disturb the finding of the jury upon this account.

It is next contended that appellee's testimony is numbered 3, 4 and 5 are improper because they show the jury that "unless you believe from the evidence that the plaintiff Gentry contracted and agreed with the defendant to keep the house to remain the verdict should be for the plaintiff." It will be observed that the exception referred to is preceded by a statement of the fact that "The landlord is not required by law to make repairs on property leased by him to a tenant unless he has a lease so to do as a part of the lease." If the appellee were holding by virtue of a lease, implied or otherwise, then these instructions were accurate. Counsel for appellee contends that Gentry was merely a tenant from month to month, and that appellee was not

tenants of Soucy, and whether this contention be correct or not, the appellee was entitled to instructions upon his theory of the case, but in all events we are of the opinion that the appellants' rights were not prejudiced by these instructions for the reason that the appellants' instructions 1 and 4 advise the jury that if L. D. Abbott rented the premises to appellants and agreed to keep the same in repair, that this would be binding upon Soucy and he would have to allow for the repairs defendants were required to make. Criticism is also made upon appellee's instructions 2 and 8 that they were misleading upon the question of compromise in setting off the damages sustained by appellants against the claim of rent due appellee. While it may be true that these instructions, or at least some of them, are not strictly accurate, yet as the jury found that no compromise had been made, we are unable to see how the appellants' rights are prejudiced thereby, or that such error was committed as to require a reversal of this case. When these instructions are considered together we are unable to see how the jury could have been misled to the prejudice of the appellants, and we do not think that they were misled, as they allowed the appellants' damages for failure to make repairs. It is true the amount allowed was not as great as claimed, but it was a question for the jury to determine how much should be allowed. The criticisms made upon appellee's instruction 1 and 7 are without merit, and when the instructions of appellants and appellee are considered together we are of the opinion that the jury was not misled as to the proper issue to be determined by them.

...of Sonoy, and what in this contention be con-
test or not, the appellee was entitled to instructions
...his theory of the case, but in all events we are
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appellants' instructions 1 and 4 advise the jury that
if L. D. Abbott wanted the premises to appellants and
agreed to keep the same in repair, that this would be
standing upon Sonoy and he would have to allow for the re-
pairs defendants were required to make. Objections is
made upon appellee's instructions 2 and 3 that they
were misleading upon the question of compromise in set-
tling off the damages sustained by appellants against the
claim of rent due appellee. While it may be true that
these instructions, or at least some of them, are not
fully accurate, yet as the jury found that no compro-
mise had been made, we are unable to see how the appellants'
rights are prejudiced thereby, or that such error was
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rors made upon appellee's instructions 1 and 2 are with-
out merit, and when the instructions of appellants and
appellee are considered together we are of the opinion
that the jury was not misled as to the proper issue to be

It is next contended that the trial court erred in telling the jury that its fifth special finding was inconsistent with its general verdict. It appears from the record that when the jury returned in open court, and the verdict was read, the Judge stated: - "There seems to be a variance between the special finding and general verdict; they are not consistent. Are you satisfied with this verdict? If not, you may retire with the officer to your room to further consider the same." This was not calling the attention of the jury to the fifth special finding as contended by counsel, but was a mere statement by the Court in a general way that he believed the verdict inconsistent and asked them if they were satisfied, or if they desired to retire and further consider the verdict. We do not regard this as being such an interference by the Court with the verdict of the jury as to require a reversal.

This case has been tried twice in the lower court and once in the Appellate Court and is here now for the second time, and the transactions are so small that we feel that the litigation ought to be ended, unless such errors exist as to require a reversal. While there may be some irregularities in the proceedings of this trial, yet we are of the opinion that substantial justice has been done, and that the irregularities are not such as to demand a reversal of this case, and finding no such errors the judgment is affirmed.

JUDGMENT AFFIRMED.

(Not to be reported in full.)

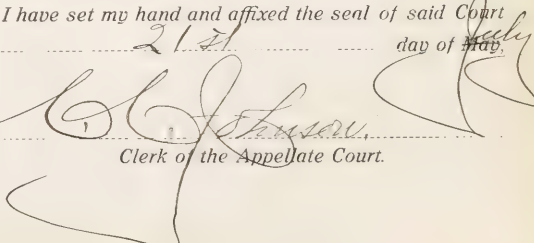
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 erred in calling the jury that the fifth special finding
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 from the record that when the jury returned in open
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 and general verdict; they are not consistent. Are you
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 to the fifth special finding as contended by counsel,
 but was a mere statement by the Court in a general way
 that he believed the verdict inconsistent and asked them
 if they were satisfied, or if they desired to retire and
 further consider the verdict. We do not regard this as
 being such an interference by the Court with the verdict
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This case has been tried twice in the lower
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 there may be some irregularities in the proceedings of
 this trial, yet we are of the opinion that substantial
 justice has been done, and that the irregularities are
 not such as to demand a reversal of this case, and there-
 fore no such errors the judgment is affirmed.

JUDGMENT AFFIRMED.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 21st day of May,
A. D. 1915.


Clerk of the Appellate Court.

HA 262

766

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

Hon. Harry Higbee, Justice.

✓ Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 21st day of July, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 262

Handfelder,

Appellee.

~~ERROR~~
APPEAL FROM

vs.

No. 49

CIRCUIT COURT

October Term, 1914.

The East Side Levee and San-

itary District,

MADISON COUNTY

Appellant.

TRIAL JUDGE

HON. LOUIS BERNREUTER.



In the Appellate Court.

Fourth District.

October Term 1914.

Frank Handfelder,
Appellee

vs.

Appeal from the Circuit Court
of Madison County, Illinois.

The East Side Levee and
Sanitary District.
Appellant.

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McBride, P. J.

This was an action in case brought by appellee against appellant to recover damages alleged to have been occasioned by a certain levee constructed by appellant, which obstructed the flow of surface water from the premises of appellee, whereby said premises were overflowed, divers growing crops and other property injured and destroyed, the well and cellar flooded, and the premises rendered unhealthful and unsanitary.

The declaration consisted of a single count to which a plea of not guilty was interposed. A trial by jury resulted in a verdict for appellee in the sum of \$1000.00, and the Court after overruling a motion for a new trial, and in arrest of judgment, rendered judgment upon this verdict, to reverse which, this appeal is prosecuted.

Appellant, The East Side Levee & Sanitary District was organized under an act of the General Assembly, entitled "An Act to create sanitary districts in certain localities, and to drain and protect the same from overflow

IN THE APPELLATE COURT,
 FIRST DISTRICT,
 CHICAGO, ILLINOIS,
 January Term 1915.

Frank Buchsbaum
 Appellant
 vs.
 The East Side Levee and
 Sanitary District,
 Appellee.

Appeal from the Circuit Court
 of Madison County, Illinois.

MOBYL, J.

This was an action in case brought by appellee against appellant to recover damages alleged to have been sustained on a certain levee constructed by appellee, which crossed the line of section west from the premises of appellee, whereby said premises were flooded, there being some and other property located and destroyed, the well and cistern flooded, and the same were rendered unsuitable and unsanitary.

The declaration consisted of a single count in which a plea of not guilty was interposed. A trial by jury resulted in a verdict for appellee in the sum of \$1000.00, and the Court after overruling a motion for a new trial, and in arrest of judgment, rendered judgment upon this verdict, to reverse which, this appeal is prosecuted.

Reversed.

Appellant, The East Side Levee & Sanitary District was organized under an act of the General Assembly, entitled "An Act to create sanitary districts in certain localities, and to drain and protect the same from overflow."

for sanitary purposes," approved May 17th 1907, in force July 1st, 1907. (Jones & Ad. Stat. Vol. 3, Chap 42, Pars. 4325 to 4352, inc.) As a part of the scheme for drainage and sanitary improvement adopted by appellant, it caused to be constructed, after the 1st of March 1910, across a part of Choteau Township in Madison County, what is known as the Cahokia Creek Diversion Channel, an artificial water-way, beginning at Cahokia Creek on the east and running in a westerly direction to the Mississippi River, a distance of about four miles. This diversion channel ~~is of the width of one hundred feet at the bottom, and had levees on each side thereof, the levees on the north in the vicinity of the premises of appellee being from ten to fifteen feet in height, and sufficiently wide at the top so that a team and rig could be driven thereon.~~ The purpose of this channel was to divert the waters of Cahokia Creek, (a natural water course) or a part thereof, and carry them into the River by means of this artificial channel.

This ~~Diversion Channel~~^{was} is located entirely outside the boundaries of the District, and the premises of appellee did not constitute any part thereof.

~~Appellee is a tenant farmer, and in July 1913 he was leasing on what is known as the "Hazard Farm". His lease therefor began on the 1st day of March 1910 and ran for a period of three years, expiring February 28th, 1913. This farm comprised 8.17 acres of land and is located in the Southwest Quarter of Sec. Ten Choteau Township in Madison County.~~ Immediately south of the premises occupied by appellee ~~is~~^{was} a public highway, and immediately south of the highway ~~is~~^{was} the north levee of the Diversion Channel, the levee being about one hundred

the said improvement," approved May 17th 1907, in force

from 1st Jan. 1907. Cases & Ad. Stat. Vol. 5, Chap. 43, Sec.

1000 to 1100, (Am.). As a part of the scheme for drainage

and sanitary improvement adopted by appealant, it was to

be connected, after the 1st of March 1910, across a part

of Division Township in Madison County, what is known as the

Columbia Creek Diversion Channel, an artificial water-

way, at Columbia Creek on the east end running in a

generally direction to the Mississippi River, a distance of

about four miles. This diversion channel is of the width

of one hundred feet at the bottom, and had levees on each

side thereof, the levee on the west side being from ten to fifteen feet in

height, and sufficiently wide at the top to admit of team and

traffic could be driven thereon. The purpose of this channel

was to divert the waters of Columbia Creek, (a natural

water course) or a part thereof, and carry them into

the River by means of this artificial channel.

This Diversion Channel is located entirely outside

the boundaries of the District, and the premises of app-

ellant did not constitute any part thereof.

Appellant is a private person, and is not a corporation.

Appellant is not a party to the said improvement.

Appellant is not a party to the said improvement.

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feet from the dwelling house occupied by appellee and his family.

The public highway lying between appellee's premises, and the north levee ^{was} slightly above the level of the land lying to the north, but was not of sufficient height to constitute an appreciable barrier to the flow of surface water from said premises.

Through the eastern portion of the Howard ^{was} farm ~~are~~ located the tracks of the Alton, Granite City & St. Louis Traction Company, The C. & A. R. R. Co., and the Big 4 R. R. Company. ^{of four railroads} These ^{ed} railroads enter the farm very near its southeast corner and ~~beat~~ ^{ed} slightly to the west as they proceed north. West of the Howard ~~farm~~, and something over three thousand feet west of the railroads above mentioned ^{was} ~~are~~ the tracks of the C. P. & ^{another railroad} St. L. R. R. Co. referred to in the evidence as the "Bluff Line". The west line of the Howard ^{was} farm ~~is~~ very near the center of the tract of land bounded by the railroads aforesaid, to the east and west. All of the lines of railroad above mentioned, north of the levee in question ^{was} ~~are~~ located upon grades or embankments, which connect ^{ed} with the north levee constructed by appellant, and at the point of intersection ^{was} ~~are~~ of approximately the same ^{was} height of the levees.

As a result of these structures above mentioned, the lands occupied by appellee were located in a pocket or basin, bounded on the east and west by the railroad grades or embankments, and on the south by appellant's levee.

The evidence ~~tends to show that~~ The lands in

least from the dwelling house occupied by appellant and his family.

The house is a small building, and the north level is slightly above the level of the land lying to the north, but not of sufficient height to constitute an appreciable barrier to the flow of surface water from said premises.

Through the eastern portion of the house, and also through the eastern portion of the lot, a small stream flows, and the water from this stream flows into the street.

From very near the southeast corner and very slightly to the west as they proceed north. West of the house, and something over three thousand feet west of the railroad above mentioned are the lands of appellant.

The land of appellant is very near the center of the tract of land bounded by the railroad above mentioned, north of the level in question. All of the lands are located upon grades or embankments, and the north level constructed by appellant, and as the level of intersection are of approximately the same height as the level.

As a result of these structures above mentioned, the lands occupied by appellant are located in a pocket or basin, bounded on the east and west by the railroad grades or embankments, and on the south by appellant's

The evidence tends to show that the lands in

question, and other lands in the immediate vicinity, comprising several hundred acres ^{were} ~~are~~ very nearly level, having a slight fall to the south or southeast, and naturally drained in that direction, until such natural drainage was obstructed by appellant's levee.

To take care of the water coming from this territory lying north of appellant's levee, and between the grades of the railroads above mentioned, appellant placed ^{only} one twenty-four inch pipe through its north levee located a short distance west of the railroad grade on the east side of the Howard Farm. No other means of any kind was provided to care for water which naturally came from the premises in question or of other lands in the neighborhood vicinity. The pipe was equipped with a valve operated by means of a screw and at the outlet had a flap valve designed to operate automatically by water pressure. The evidence tends to show that no arrangements had been made by which the outlet end of this pipe could or would be kept free from accumulations of drift so that the water could flow through the same without interruption.

The evidence further tends to show that on the night of July 13th, 1912, being Saturday night, and again on the following Tuesday night, there occurred very heavy rains on, and in the vicinity of the premises occupied by appellee, and the evidence tends to show that on Sunday morning following the first rain a large portion of the farm was under water; that the water entirely surrounded the house, barn, and other outbuildings, filled the well and cellar, and extended over the public highway from the railroad grade on the east to the railroad grade on the west, and that over this ^{road} ~~and~~ the water was from a foot to

examined in that direction, until such material should be
obtained by specialist's leaves.

[illegible]

The evidence further tends to show that on the night of July 13th, 1912, being Saturday night, and again on the following Tuesday night, there occurred very heavy rains on, and in the vicinity of the premises occupied by applicant, and the evidence tends to show that on Sunday morning following the first rain a large portion of the lawn was under water; that the water entirely surrounded the house, barn, and other outbuildings, filled the cellars and cellars, and extended over the public highway from the railroad grade on the east to the railroad grade on the west, and that ever since the water was there a hole in

sixteen inches deep, and was of such extent and depth that it was backed up to and overflowed a part of the farm adjoining appellee's premises on the north. The evidence tends to show that this water was held upon these premises by appellant's levee which prevented its escape to the south.

Witnesses who had lived in the neighborhood of the premises in question for upwards of thirty years testified that they had never, upon any former occasion, seen this highway under water. The evidence also tended to show that all along appellant's levee between the railroad grades, the water was backed up to a depth of two feet or more, and at the intake pipe through the levee, on the morning following this rain, the water was over five feet deep.

As a result of the flooding of appellee's premises, the evidence tends to show that one hundred chickens were drowned; that several acres of potatoes were destroyed; that wheat in the shock was damaged; the pasture lands and the growing corn materially injured, the well and cellar flooded and the premises were rendered unsanitary.)

Among other things, appellant insists upon this appeal, that no legal duty rested upon it to refrain from obstructing the flow of surface water from the premises of appellee, and that no legal duty rested upon it to provide an outlet for such waters. We cannot agree with this contention. It would hardly be reasonable to say that because appellant was organized for the express purpose of "draining property, protecting it from overflow, and for sanitary purposes," it was authorized to create ^{outside} its district, the exact conditions which it was designed to remedy, and escape liability therefor.

eighteen inches deep, and was of such extent and depth that it was packed up to and overflowed a part of the area adjoining appellee's premises on the north. The evidence tends to show that this water was held upon these premises by appellant's levee which prevented its escape to the south.

Witnesses who had lived in the neighborhood of the premises in question for upwards of thirty years testified that they had never, upon any former occasion, seen this extent of water. The evidence also tends to show that all along appellant's levee between the railroad tracks, the water was backed up to a depth of two feet or more, and at the intake pipe through the levee, on the morning following this rain, appellant was very busy.

As a result of the flooding of appellee's premises, the witness tends to show that not a single house was destroyed; that several horses of various breeds were destroyed; that about 100 sheep were drowned; the poultry house and the growing crop were materially injured, the well and cellar flooded and the premises were rendered uninhabitable.

Some other witnesses, appellant insists were not present, that no legal duty rested upon it to restrain the operation of the flow of surface water from the premises of appellee, and that no legal duty rested upon it to provide an outlet for such water. It cannot agree with this contention. It would hardly be reasonable to say that because appellant was organized for the express purpose of "draining property, protecting it from overflow, and for sanitary purposes," it was authorized to create the flooding the exact conditions which it was designed to remedy, and escape liability therefor.

"If an individual owner of the land where the levee was constructed had done the same acts as the defendant, he would be liable for the consequent damages. He would have no right to build a levee which would prevent the escape of flood waters and thereby flood the lands of the plaintiff." (Bradbury vs. Vandalia Drainage Dist. 230 Ill., 38.) The Courts of this State have also held that there is no difference in principle whether the waters come from the clouds above or has fallen upon remote hills, and come thence in a running stream. (Gormley vs. Sanford, 52 Ill., 158; Bradbury vs. Vandalia Drainage Dist. Supra.) In the case of Gormley vs. Sanford supra the Court said; "The right of the owner of the superior heritage to drainage is based simple on the principle that nature has ordained such drainage, and it is but plain and natural justice that the individual ownership arising from social laws should be held in accordance with pre-existing laws and arrangements of nature. As water must flow and some rule in regard to it must be established where land is held under the artificial titles created by human law, there can clearly be no other rule at once so equitable and so easy of application as that which enforces natural laws."

Upon this question, the Courts of this State have adopted the rule of the civil law, and under that rule the right of drainage is governed by the law of nature, and the lower proprietor cannot do anything which prevents the natural flow of surface water and casts it back upon the land above; and our courts recognize no distinction between surface waters and those which flow in the natural watercourse. (Bradbury vs. Vandalia Drainage Dist. supra. ¶.)

It has been held that an aggregation of land

...in an individual owner of the land where the
leaves was constructed had been the same rule as the rule
...the escape of flood waters and thereby flood the lands of
the adjacent owner. (See, for example, *Wright v. Carter*, 111
Ill. 36.) The doctrine of this State has also been
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tinction between surface waters and those which flow in
some natural watercourse. (See, for example, *Wright v. Carter*,
111 Ill. 36.)
It has been held that an appropriation of land

owners cannot by voluntarily accepting the privileges conferred by a Levee & Drainage Act, and organizing a district, erect a levee which obstructs the natural flow of the water and injures the land of another and without liability therefor. (Eradbury vs. Vandalia Drainage Dist. supra)

In view of these principles of law, if appellant desired to construct and maintain the levee in question it was its duty to make adequate provisions to care for the surface water coming from appellee's premises, and which would, in consequence of the construction of the levee, if no such provisions were made, be obstructed and held back upon the premises. Whether or not this levee did obstruct the flow of surface water from appellee's premises, and whether or not appellant had made adequate provisions to care for the water naturally falling upon said premises were questions of fact to be submitted to the jury.

Whatever theory appellant may urge upon this appeal, it is apparent from an examination of the instructions requested by it, and given to the jury in its behalf, that in the trial court, appellant proceeded upon the theory that if, in the construction of this levee it exercised reasonable care to furnish an outlet for the water from appellee's premises, equal to that which existed before the levee was constructed, it would not be liable. The duty of appellant as set forth in these instructions is in harmony with the law as we understand it, and it was a question for the jury to determine whether or not appellant had complied with this duty.

From a consideration of the evidence in this case we cannot say that the jury were not justified in

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district, erect a levee which obstructs the natural flow
of the water and injures the land of another and creates
a liability therefor. (Bradbury vs. Landolt, 100 Cal.
Dist. Supr.)

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care for the surface water coming from appellee's prop-
erty, and which would, in consequence of the construc-
tion of the levee, if no such provision were made, be
constructed and held back upon the premises. Failure to
do this levee did obstruct the flow of surface water from
appellee's premises, and whether or not appellant had made
adequate provisions to care for the water naturally fall-
ing upon said premises was questions of fact to be sub-
mitted to the jury.

Nevertheless, appellant may argue that
it is apparent from an examination of the facts
long requested by it, and given to the jury in its verdict,
that in the trial court, appellant proceeded upon the
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lant had complied with this duty.

From a consideration of the evidence in this
case we cannot say that the jury was not justified in

Finding that the twenty-four inch pipe through appellant's levee did not furnish an outlet for the water coming from the premises of appellee, and other adjacent premises, equal to that which such premises had enjoyed prior to the construction of this levee, and when such premises had approximately a half mile of open unobstructed territory over which surface water could escape.

It is also contended by appellant that being a municipal corporation charged with the duty of improving sanitation by preventing overflow, it had a lawful right to interfere with natural drainage conditions, and to maintain the levee complained of for that purpose: that such levee once erected became a permanent structure, and that any cause of action for injury to property occasioned thereby arises when it is constructed, and that only one suit may be maintained which must be for all damages resulting from the construction of the levee; that the proper measure of damages is the depreciation of the market value of the property affected, and that no suit for damages resulting from the subsequent maintenance of such structure can be maintained. Appellant insists that the levee erected by it is a lawful structure and therefore permanent, and that it cannot be held to be a continuing nuisance, giving rise to successive actions for damages as they may occur. It contends that as it appears from the evidence that the levee in front of appellee's premises was constructed in 1910 or 1911, and was in the condition complained of at the time the crops were planted, and appellee knew of the conditions then existing, the declaration, and proofs in support thereof exhibited no right in appellee to recover damages from appellant for the injuries counted upon.

An examination of the declaration upon which trial was had shows that appellee was not suing for any

finding that the twenty-four inch pipe through appellant's
leaves did not furnish an outlet for the water coming from
the premises of appellee, and other adjacent premises,
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approximately a half mile of open unobstructed territory
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It is also contended by appellant that being a
municipal corporation charged with the duty of improving
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tain the levee complained of for that purpose; that such
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any cause of action for injury to property occurred there-
by at once when it is constructed, and that only one suit may
be maintained which must be for all damages resulting from
the construction of the levee; that the proper measure of
damages is the depreciation of the market value of the prop-
erty affected, and that no suit for damages resulting from
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a lawful structure and therefore permanent, and that it can-
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successive actions for damages as they may occur. It con-
tends that as it appears from the evidence that the levee
in front of appellee's premises was constructed in 1910 or
1911, and was in the condition complained of at the time
the crops were planted, and appellee knew of the condition
then existing, the declaration, and proofs in support
thereof exhibited no right in appellee to recover damages
from appellant for the injuries caused upon.

An examination of the declaration upon which
trial was had shows that appellee was not suing for any

damages to the real estate, nor did he set up any claim that the real estate itself, by reason of the construction of the levee had been depreciated in value; hence the rule as to the measure of damages contended for by appellant could not apply. Appellee was a tenant on the lands only, and had no such interest therein as would authorize him to sue for and recover damages for permanent injury to the land, and, as held in the case of Sanitary District of Chicago vs. Ray 199 Ill., 63, we see no reason why appellee could not sue for and recover for such loss as it occurred through appellant's negligence or wrongful act.

From a consideration of the evidence in this case it does not appear that the construction of appellant's levee necessarily, and of itself alone, resulted in any damage to appellee. In fact it appears that he was not damaged thereby until the happening of the circumstances which resulted in this suit. Whether appellee, as a tenant on the premises in question, would suffer damages on account of the construction of the levee was a contingent question, depending entirely upon the forces of nature,- that is, as to whether the rainfall upon the premises, and in the vicinity would be of such character and extent as to be obstructed by this levee, and thrown back upon the lands in question (Vette vs Sanitary Dist. 260 Ill., 432; Jones vs. Sanitary Dist. 252 Ill., 591.) It is entirely possible, and no doubt there will be many seasons when the rainfall is light, or where it will come at such regular intervals, and in such quantities as to be readily absorbed by the soil, and under such circumstances

damages to the real estate, nor did he set up any claim
that the real estate itself, by reason of the destruction
ion of the leaves had been depreciated in value, because
the rule as to the measure of damages contained therein by
appellant could not apply. Appellee was a tenant of the
lands only, and had no such interest therein as would
entitle him to sue for and recover damages for the
injury to the land, and, as held in the case of *Sanitary*
District of Chicago vs. Ray 125 Ill. 63, he was not
reason why appellee could not sue for and recover for such
damages as he sustained by reason of the destruction of
the leaves.

From a consideration of the evidence in this
case it does not appear that the destruction of appellee's
land's leaves necessarily, and of itself alone, resulted
in any damage to appellee. In fact it appears that he
was not damaged thereby until the happening of the fire,
which destroyed the leaves on his land. The leaves of the
as a tenant on the premises in question, could neither sue
for nor on account of the destruction of the leaves was a
contingent question, depending entirely upon the facts in
nature, - that is, as to whether the rainfall upon the pre-
mise, and in the vicinity would be of such character and
extent as to be obstructed by the leaves, and known prior
upon the lands in question (*Verste vs. Sanitary Dist.* 125
Ill. 63, *Ray vs. Sanitary Dist.* 125 Ill. 63, *Sanitary Dist.*
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this levee will not damage any one. On the other hand there may be seasons or times when there is an excessive amount of rainfall, or where large quantities fall in a short time, so that surface water will flow from said premises, and under such circumstances, if this flow is obstructed, and the water thrown back upon the premises, damages will result. We do not believe this case falls within the class of cases which hold that when the original nuisance or cause is of a permanent character, so that the damage inflicted is of a permanent character and goes to the entire destruction of the estate affected thereby, the recovery not only may, but must, be had for the entire damage in one action, as the damage is deemed to be original.

If, as contended by appellant, appellee could not recover in this case for injuries to his crops, because the crops in question were planted after the construction of the levee, then appellee would be barred of a right of recovery before he had sustained any damage. The injury sustained by appellee constituted his cause of action; that injury was sustained when appellee's premises were flooded, -not when the levee was built. Appellee was not required to assume when he planted these crops, that appellant, by the construction of this levee would flood his lands and ruin them. On the contrary he had a right to assume that as appellant had erected a levee which would obstruct the natural flow of surface water coming from his lands that it had discharged its legal duty, and provided proper facilities for the escape of such surface water, at least equal to those which he had enjoyed prior to the construction of this levee. (Sanitary Dist. vs. Ray, 85 Ill., Ap., 115.) Appellant was under a continuing

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ages will result. We do not believe this case falls within
the class of cases where the law is not applicable.
... is of a permanent character, so that the
damage inflicted is of a permanent character and goes to the
entire destruction of the estate affected thereby, the re-
covery not only may, but must, be had for the entire damage
in one action, as the damage is deemed to be permanent.
It, as contended by appellant, appellee could
not recover in this case for injuries to his crops, because
the crops in question were planted after the construction
of the levee, and appellee could be deemed to have a right to
construct the levee in his own way. The levee
was constructed by appellee to protect his crops of cotton,
and the levee was constructed in accordance with the
flooded, not when the levee was built. Appellee was not
required to assume when he planted these crops, that appelli-
ant, by the construction of this levee would flood his
lands and ruin them. On the contrary he had a right to
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vided proper facilities for the escape of such surface
water, at least equal to those which he had enjoyed prior
to the construction of this levee. (Barth v. B. & N. Y.
Appellant was under a continuing)

duty to obviate defects in its work, and if, in the construction of its levee, it failed to provide proper means of escape for surface water coming from appellee's premises, it was its duty to remedy these defects. If it failed to do so, the imperfect construction constituted a continuing nuisance, for which successive suits may be maintained. (Sanitary Dist. Vs. Ray 85 Ill., Ap., 115.)

It is further insisted by appellant that the legal duty required of those who build embankments is to use such engineering skill as is ordinarily applied to works of that kind, in view of the size and habits of the stream, the character of its channel, and the declivity of the territory forming the watershed; that extraordinary floods such as are not by reasonable prudence to be anticipated need not be provided against.

In C.P. & St. L.R.R.Co. vs. Reuter 223 Ill., 387, where a similar question was before the Court, it was said: "The principle clearly is that although a rainfall may be more than ordinary, yet if it be such as has occasionally occurred, and, it may be, at irregular intervals, it is to be foreseen that it will occur again, and it is the duty of those changing or restraining the flow of water to provide against the consequences that will result from it.*** Though of rare occurrence such rainfalls are not phenomenal, and therefore beyond reasonable anticipation.*** The question, then, is not whether appellant has sufficiently provided for the escape of water of ordinary floods, but has it provided for the escape of water of such unusual or extraordinary floods as it should have anticipated would occasionally occur in the future, because they had occasionally occurred

any to obviate defects in its work, and it, in the construction of its levee, it failed to provide proper means of escape for surface water coming from appellant's premises, it was its duty to remedy these defects. It is

failed to do so, the immediate construction contemplated a continuing nuisance, for which successive suits may be maintained. (Sanitary Dist. vs. City of Chicago, 111 Ill. 2d 111.)

It is further insisted by appellant that the

legal duty required of those who build embankments is to use such engineering skill as is ordinarily applied to works of that kind, in view of the size and habits of the water, the character of its channel, and the desirability of the territory forming the watershed; that extraordinary floods such as are not by reasonable prudence to be anticipated need not be provided against.

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nary floods as it should have anticipated would occasionally

occur in the future, because they had occasionally occurred

after intervals though of irregular duration in the past." In the foregoing case it is held that this question is one of fact for the determination of the jury. We cannot say that the evidence upon this question was of such character as to require the jury to find that appellee's damages were occasioned by an "Act of God." Even if the rainfall in question had been of that extraordinary character and extent as to justify us in saying that it was an "Act of God" which appellants were not bound to anticipate or guard against, yet if the evidence showed appellant to have been guilty of negligence in the construction and maintenance of its levee, and this in connection with the extraordinary rainfall produced the damages sued for, appellant is still liable. (Quincy Gas & Electric Co. vs. Schmidt, 133 Ill., Ap. 647; O. & M. Co. vs. Thillman, 143 Ill., 137.)

We do not think the Court erred in denying the preemptory instructions requested by appellant, and in submitting the case to the jury.

It is claimed that the court erred in allowing a witness to testify that there were stalks in the inlet, the objection being that the declaration charged "negligent construction," not "negligent operation". We see no objection to this testimony. If the intake end of the pipe designed to take care of the surface water from the territory in question was left unprotected so that accumulations of drift might lodge there, and thus obstruct the free passage of the water, this would tend to show "negligent construction". It is also claimed that the court erred in allowing the witness Williams to state on cross-examination that in stages of high water the Mississippi could rise higher than the intake end of the pipe through the levee. While we do not see that this testimony was material to any

after intervals though of irregular duration in the past. In the foregoing case it is held that this question is one of fact for the determination of the jury. The correct way that the evidence upon this question was of such character as to require the jury to find that appellee's damages were occasioned by an "Act of God." Even if the rainfall in question had been of that extraordinarily character and extent as to justify us in saying that it was an "Act of God" which appellants were not bound to anticipate or guard against, yet if the evidence showed appellant to have been guilty of negligence in the construction and maintenance of its levee, and this in connection with the extraordinary rainfall produced the damages sued for, appellant is liable. (Columbia River & Electric Co. vs. Washelli, 212 Ill. 417; O. & M. Co. vs. Tillman, 143 Ill. 187.)

We do not think the Court erred in saying the preliminary instructions requested by appellant, and in admitting the case to the jury.

It is claimed that the court erred in allowing a witness to testify that there are drains in the levee, the objection being that the declaration charged "negligent construction," not "negligent operation." We see no objection to this testimony. If the intake end of the levee designed to take care of the surface water from the farm-very in question was left unprotected so that water might get of drift might lodge there, and thus defeat the free passage of the water, this would tend to show "negligent construction." It is also claimed that the court erred in allowing the witness Williams to state on cross-examination that in stages of high water the Mississippi would rise higher than the intake end of the pipe through the levee. While we do not see that this testimony was material to any

issue in the case, we do not see how it would in any way prejudice the jury, or appellant's rights. It is also insisted that the court erred in refusing to allow appellant to show by the records of the Weather Bureau at St. Louis that the greatest rainfall occurring since 1871 occurred during the storm in question. This ruling was proper. Conditions existing at St. Louis, or the record of conditions existing there, would not tend to prove conditions existing on the Howard Farm in Madison County, and would throw no light upon any question involved herein.

Objection is also made to two instructions given for appellee, and also to the action of the court in refusing two instructions requested by appellant. Appellant has failed to point out how or in what manner the jury were misled by anything contained in the first instruction given for appellee, or in what manner its rights were prejudiced thereby, and we cannot see where the same constitutes error. The second instruction complained of relates to the measure of damages, and is supported by St. Louis Bridge Ry. Assn vs. Schultz, 236 Ill., 409. In addition to this the instruction relates to the measure of damages, and as it is not assigned as error that the damages awarded are excessive, the giving of this instruction, even if erroneous would not constitute reversible error.

As to the two instructions requested by appellant and refused by the Court, and of which complaint is made, we believe they were properly refused, and what we have said heretofore in this opinion disposes of the propositions presented by those instructions.

We believe that the evidence in this case justified the jury in finding for appellee; that this re-

issue in the case, and do not see how it would in any way
benefit the jury, or appellant's rights. It is also
insisted that the court acted in refusing to allow the
and to show by the records of the earlier trial that
acted during the storm in question. This ruling was proper.
conditions existing at St. Louis, or the record of conditions
existing there, would not tend to prove conditions existing
on the Howard Farm in Madison County, and would throw no
light upon any question involved herein.

Objection is also made to the instructions
given for appellee, and also to the action of the court in
refusing two instructions requested by appellant. Appellant
has failed to point out how or in what manner the jury was
misled by anything contained in the first instruction
given for appellee, or in what manner its rights were
prejudiced thereby, and we cannot see where the same error
exists. The second instruction complained of
relates to the measure of damages, and is supported by the
Louisiana Bridge Ry. Assn. vs. Scholte, 233 Ill., 400. In
relation to this the instruction relates to the measure of
damages, and as it is not assigned as error that the dam-
ages awarded are excessive, the giving of this instruction,
even if erroneous, could not constitute reversible error.
As to the two instructions requested by appellant,
and refused by the court, and of which complaint is made,
we believe they were properly refused, and that as these
said instructions in this opinion dispose of the propositions
presented by these instructions.

"We believe that the evidence in this case
justified the jury in finding for appellee; that this was

word is free of substantial error; that substantial justice has been done between the parties, and that the judgment of the Circuit Court should be, and is affirmed.

JUDGMENT AFFIRMED.

(Not to be reported in full)

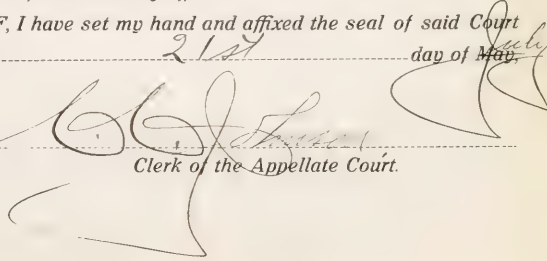
There is a list of witnesses in the
appendix to the report, and the
names of the witnesses are given in the
margin of the report.

JUDICIAL ATTACHMENT

(List of witnesses in full)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 21st day of May,
A. D. 1915.


Clerk of the Appellate Court.

HA 268

767

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

Hon. Harry Higbee, Justice.

✓ Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

July

And afterwards, to-wit: On the 21st day of ~~July~~ A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 26

ROPIEQUET -et al.,

Appellants.

~~ERROR TO~~

APPEAL FROM

vs.

No. 52

CIRCUIT COURT

October Term, 1914.

KNEBELKAMP,

ST. CLAIR COUNTY

Appellee.

TRIAL JUDGE

HON. GEORGE A. CROW.

Term No. 37.

In the Appellate Court

Agenda No. 16.

Fourth District.

October Term, A. D. 1914.

R. W. Ropiequet and
R. W. Ropiequet, Trustee,

Appellants.

vs.

Christ. Knebelkamp,

Appellee.

:
:
:
:
:
: Appeal from the Circuit Court
: of St. Clair County, Illinois.
:
:
:

McBride, P. J.

The appellant instituted a suit by bill of review in the Circuit Court of St. Clair County, which was dismissed upon the hearing of a demurrer filed by appellee. The bill of review in this case undertakes to review the proceedings instituted in said Circuit Court by Christ. Knebelkamp, under the style of Christ. Knebelkamp & Company, against Schwab Aluminum Company and National Metal Company, and the bill was afterwards amended and purported to make R. W. Ropiequet and R. W. Ropiequet, Trustee, additional parties defendant to the suit.

The bill sets out a petition filed at the ~~September Term 1907~~ by Christ. Knebelkamp under the name of Christ Knebelkamp & Company and against Schwab Aluminum Company and National Metal Company for a mechanic's lien ^{on certain premises} ~~on parts of lot eight (8) and ten (10) in Survey No. 27+~~ ~~as shown by plat book 282 on page 353 in the recorder's office of St. Clair County, and alleged that the petitioner~~

R. W. Hopland and
 R. W. Hopland, Trustees,
 Appellants.
 vs.
 Christ. Knobelkamp,
 Appellee.

Syllabus.

The appellant instituted a writ by bill of
 review in the Circuit Court of St. Clair County, which
 was dismissed upon the hearing of a demurrer filed by
 appellee. The bill of review in this case undertakes to
 review the proceedings instituted in said Circuit Court
 by Christ. Knobelkamp, under the style of Christ. Knobel-
 kamp & Company, against Bohman Aluminum Company and Nation-
 al Metal Company, and the bill was afterwards amended and
 purported to make R. W. Hopland and R. W. Hopland,
 Trustees, additional parties defendant to the writ.
 The bill sets out a petition filed at the
 Circuit Court by Christ. Knobelkamp under the name
 of Christ Knobelkamp & Company and against Bohman Aluminum
 Company and National Metal Company for a mechanic's lien
 on parts of lot eight (8) and ten (10) in County No. 274
 as shown by plat book 72 on page 332 in the recorder's
 office of St. Clair County, and alleges that the petition

Therein erected certain buildings upon said ~~lot~~ ^{land} and furnished material therefor for a stipulated price, and for extra materials, as shown in said petition. To this petition a demurrer was filed, ~~and on the first day of October, 1907.~~ The petitioner filed an amended bill, which was substantially the same as the former bill, and to this a demurrer was also filed. The demurrer contained a clause stating that R. W. Ropiequet, trustee, had an encumbrance, as appeared of record, upon the said lot. To this petition a demurrer was also filed, and on the 16th of March, 1908 the petitioner filed a second amended petition, substantially as the first, except that it made R. W. Ropiequet a party defendant and asked for a process against him. To this petition a demurrer was filed ~~on April 18, 1908.~~ While said case was pending at the ~~April Term~~ and before the last demurrer had been disposed of, the case was by agreement between Christ. Knebelkamp of one part and the National Metal Company and Scheam Aluminum Company of the other part removed from the docket under an agreement upon the part of the National Metal Company and Scheam Aluminum Company to pay to said Knebelkamp \$1646.25 within one year, and that the afore mentioned suit was to be removed from the docket and if the said parties failed to pay the amount stipulated within the year then the cause was to be re-docketed and the said parties to the agreement were to confess a decree for a lien in said suit. The said parties having failed to make payment as provided by said agreement, the petitioner on ~~July 13, 1908~~ gave notice for a reinstatement of said cause and an agreement was had to reinstate the same upon the docket. ~~That on~~

The petition was filed in the District Court of the United States for the District of Columbia, and was assigned to the Honorable Judge Charles E. Smith. The petition was filed on the 1st day of January, 1908, and was assigned to the Honorable Judge Charles E. Smith. The petition was filed on the 1st day of January, 1908, and was assigned to the Honorable Judge Charles E. Smith.

~~August 17, 1908, and more than ten days prior to the~~
~~September Term of said court, Richard Ropiequet, Trustee,~~
entered his appearance in said cause in the words as
follows: "And now comes Richard Ropiequet, Trustee, one
of the defendants in the above entitled cause, and waives
service of process of summons and enters his appearance
therein." ~~Thereupon at the September term of said court~~
A rule was entered upon the defendants to answer the
amended bill, and on September 22nd, 1910, no answer
having been filed, the amended bill was ordered taken as
confessed and the cause referred to the master in chancery
to take testimony and report proofs and findings of law,
and after a recommendation for a decree ~~and on January 18,~~
~~1911~~ the master made a report with his conclusions showing
the amount of \$1713.57 due the petitioner and recommended
a decree of foreclosure and that defendants Schwan Aluminum
Company and National Metal Company pay the said amount with-
in thirty days. ~~That on February 17, 1911,~~ A decree was
rendered in said cause finding that the defendants had been
duly served with process, or entered their appearance at a
former trial of this court, finding that the agreement
aforesaid made between Christ. Knebelkamp and the National
Metal Company and the Schwan Aluminum Company, had been
duly entered and that the undisposed of demurrer was waived
and that the petitioner was entitled to a lien on said
premises for said amount and costs, that all defendants and
all persons claiming through or under them since the con-
demnation of this suit be forever barred and foreclosed from

entered his appearance in said cause in the year 1911.
 of the defendant in the above entitled cause, and entered
 service of process of summons and entered his appearance
 therein. A note was entered upon the defendant's return to the court
 amended bill, and on September 22nd, 1911, an answer
 having been filed, the amended bill was served upon the
 defendant and the cause referred to the master in equity
 to take testimony and report proofs and findings of fact.
 This the master made a report with his recommendations
 the amount of \$1713.27 due the petitioner and recommended
 a decree of foreclosure and that defendant's balance should
 be paid to the petitioner within thirty days. On February 17, 1912, a decree was
 rendered in said cause finding that the defendant was
 duly served with process, or entered their appearance as
 provided by law, and that the defendant was the
 defendant made between Charles E. Knabbe and the National
 Metal Company and the St. Paul Aluminum Company, and that
 only entered and that the undisposed of sum was
 and that the petitioner as entitled to a lien on said
 judgment for said amount and costs, that all defendants and
 all persons claiming through or under them since the date
 judgment of this suit be forever barred and foreclosed from

all equity of redemption and claim in and to said premises or any part thereof, if the same are not redeemed according to law by the defendants within twelve months next after such sale. That ~~at the April Term 1811, of said Court,~~ a report of sale was made by the master showing the said premises to have been purchased by the said Christ. Knebelkamp for the amount of the debt and costs. ~~That~~ Afterwards on May 12, 1811 a motion was entered by R. T. Ropiequet to set aside the default and decree rendered in the above entitled cause because no process was ever issued or served upon him; that he as trustee held a mortgage upon said real estate to secure a note for six thousand dollars; that he as trustee entered his appearance at the request of L. D. Turner, Attorney for petitioner, in second amended bill; that no notice was given to him of the entering of the rule to answer as required by Rule Five of said court; that said decree was taken while the demurrer above set forth was undisposed of; that the master in chancery heard the testimony without serving notice upon him personally or as trustee; that no opportunity was ever given to file exceptions to the master's report; that the decree erroneously found said real estate ~~is~~ subject to a lien and erroneously found that it had jurisdiction of the parties; That the defendant in his own person and as trustee had a meritorious defence; that said motion was supported by affidavits and overruled by said court.

The bill for review then repeated substantially the same matters set forth in said motion and avers that some errors and imperfections appear in the body of said proceedings and decree as to cause the same to be set aside, etc.

all equity of redemption and claim in and to said premises
of said estate, of the same and the interest thereon
ing to law by the defendant within a time certain here
after such sale. That at the April Term 1931, the
Court of report of sale was made by the master showing
the said premises to have been purchased by the said
Christ. Knobelkamp for the amount of the debt and costs.
That the said premises were sold with a notice and return
to R. W. Knobelkamp to set aside the said sale and return
dated in the above entitled cause because no process was
ever issued or served upon him; that he as trustee failed
to comply with said writ which is return a writ of habeas
corpus and return that he as trustee failed to comply
with an order of the Court of the said return; that the
return in second amended bill; that no notice was given to him
of the entering of the rule to answer as required by rule
five of said court; that said decree was taken this day
demurrer above set forth was undeposed of; that the master
in chambers heard the testimony without taking action
upon him personally or as trustee; that no objection was
ever given to the exceptions to the master's report; that
the decree erroneously finds said real estate is subject to
a lien and erroneously finds that it has jurisdiction of
the parties; That the defendant in his own person and as
trustee had a malicious belief that said action was
supported by affidavits and overruled by said court.
The bill for review then repeats substantially
the same matters set forth in said motion and avers that
such errors and imperfections appear in the body of said
proceedings and decree as to cause the same to be set aside.

Owing to the manner in which the several matters complained of have been presented it is difficult for the writer to produce a very methodical decision but the real points under consideration are presented and can best be determined by examining and passing upon the points wherein the bill of review is insufficient, as claimed by appellee. It is contended that this bill of review should not have been filed except upon leave of the court. As we read the bill it substantially complains of alleged errors upon the face of the bill and does not set up additional evidence or such matters as in our opinion would require leave of the court to file the same. A bill of review for errors apparent on the face of the record or to impeach a decree for fraud may be filed without leave of the court but leave must be obtained before the filing of the bill of review for newly discovered evidence. *Harrigan vs County of Peoria*, 262.Ill., 36.

The next contention is that R. W. Ropiequet is not shown to have any personal interest in this case, and it is also contended that all of the parties to the former proceeding should be made parties to this proceeding and that the owners of the property Schwan Aluminum Company and National Metal Company, who were parties to the former proceeding, are not made parties herein. If this decree should be set aside the owners of the property would certainly be interested persons and should have been made parties. "As a bill of review, the bill is, however, fatally and substantially defective; first, because all of the parties to the original decree, and whose interests are affected by the original decree, are not parties to this bill".

matters complained of have been presented to the court
 itself for the writer to provide a very methodical dis-
 cussion out the real points at issue and to show
 that the bill is substantiated by evidence and that
 upon the points therein the bill of review is justified.
 A bill of review is proper only when the bill of review
 review should not have been filed except upon leave of the
 court. As we read the bill it substantially contains the
 alleged errors upon the face of the bill and does not set
 up additional evidence or make matters as in our opinion
 would require leave of the court to file the same. A bill
 of review for errors apparent on the face of the record or
 to impeach a decree for fraud may be filed without leave of
 the court but leave must be obtained before the filing of
 the bill of review for newly discovered evidence. In this
 case the bill of review is not proper.
 The court's decision is that the bill of review is
 not shown to have any personal interest in this case, and
 it is also contended that all of the parties to the former
 proceeding should be made parties to this proceeding and
 that the owners of the property between Alabama Company
 and National Metal Company, who are parties to the former
 proceeding, are not made parties herein. If this decree
 should be set aside the owners of the property would not
 wish to be interested persons and would not want to
 be parties. No bill of review, no bill of review,
 fatally and substantially defective; first, because all
 of the parties to the bill of review, and more important
 are affected by the original decree, are not parties to
 this bill.

Turner vs. Berry, 3 Gil. 543.

Appellant contends that this court had no jurisdiction of the appellant, either personally or as trustee, and that such appears from this record. We do not so read the record, as the decree finds that all of the defendants are in court by summons or entry of appearance, and the entry of appearance of R. W. Ropiequet as trustee is set out in the proceedings, and he was ruled to answer and having failed to do so the decree was taken as confessed against him. The mere fact that he did not see fit to further follow the proceedings after having entered his appearance would not render a decree, wherein he is defaulted, erroneous as it was his duty to follow the proceedings from that point to the determination of the trial, and if he had a defense it was his duty to make it and having failed to do so he must abide the result. McDaniel vs. James, 23 Ill., 407. Even if it should be assumed that R. W. Ropiequet personally was not served and was not in court we do not think this could make any difference with the proceedings as he is not shown to have any interest in this matter personally.

Appellant seeks to excuse a failure to answer by saying that there was a demurrer on file at the time that the decree of confession was taken. This demurrer was not interposed by him but by the National Metal Company and the Schwab Aluminum Company and was, we think, waived by the agreement entered into and above set forth and because their demurrer has not been disposed of could not excuse him in not answering and setting up his rights, if he had any.

Appellant contends that this court had no jurisdiction of the appeal, either retroactively or prospectively, and that such appears from this record. It is not so read the record, as the court there said all of the defendants are in court by summons or entry of appearance, and the entry of appearance of W. H. Thompson is stated to set out in the proceedings, and in the trial to answer and having failed to do so the court is said to have confessed against him. The court said that he did not see fit to further follow the proceedings after having entered his appearance would not render a verdict, wherein he is admitted, erroneous as it was his duty to follow the proceedings from that point to the trial, and if he had a defense it was his duty to make it known, and he failed to do so he must abide the result. Judgment was entered, 22 Cal. 447. Turner is shown to answer that W. H. Thompson personally was not served and was not in court, and do not think this could make any difference, with the proceedings as he is not shown to have any interest in this matter personally.

Appellant seeks to excuse a failure to answer by saying that there was a summons on file at that time that the degree of confession was taken. This is not so as not indicated by him out by the National Metal Company and the Pacific Aluminum Company and was not taken by the agreement entered into and signed and taken and because their summons has not been dispensed of and not excuse him in not answering and setting up his rights if he had any.

The suggestion that the entry of appearance was made by the request of the attorney for petitioner is without force in this proceeding as there is no evidence or nothing upon the record in any way to justify the court in saying that such was true, and could not have been filed or heard without leave of the court.

It is contended by counsel for appellant that the record discloses that Ropiquet as trustee named was made a party to this bill. If this contention be true then we are unable to see how he is in any manner injured by this decree. It is insisted that it appears from the petition that the appellant had an interest in the premises and that it was error to proceed without having made them parties to the proceeding, as required by statute, and that the attorney for the petitioner, through the pleadings, had notice of this fact. It will be noted that the only time in the pleadings to which the court's attention was called to this fact was by a demurrer interposed by the original defendants to the petition, and not by the trustee himself, and when the trustee entered his appearance in the proceeding he did not claim that he was entitled to the rights that had been spoken of in the demurrer. So far as the original defendants and the petitioner are concerned the court had the right to decree relief at any time within two years from the completion of the work. While it does not appear from the record sought to be reviewed that appellant as trustee had a prior lien to that of the petitioner, but it is also true that if he had this prior lien and had followed up his entry of appearance by setting up this lien that it

[illegible]

would have been properly protected by the court in its decree but as he failed to do so the circuit court or this court are unable to give him relief.

We are unable to say that there is such error appearing upon the face of this record as would justify opening up of the decree by a bill of review, but even if it were, this bill could not be maintained because all parties to the former decree and persons interested are not made parties to this bill.

We are of the opinion that the court committed no error in sustaining the demurrer to this bill of review and in dismissing the same and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

(Not to be reported in full)

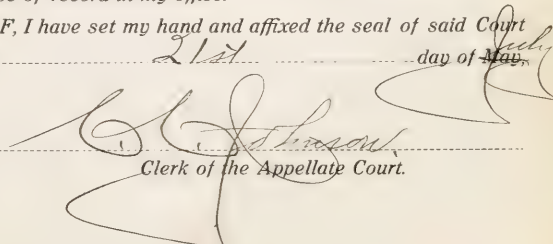
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CONSTITUTIONAL PROVISIONS

(List in reverse order of year)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 21st day of May,
A. D. 1915.


Clerk of the Appellate Court.

4A 272

768

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

Hon. Harry Higbee, Justice.

✓ Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 21st day of ~~Mar~~^{July} A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 272

Matilda M. Yackel et al., by

their next friend,

Appellees

~~ERROR TO~~
APPEAL FROM

vs.

No. 58

CIRCUIT COURT

October Term, 1914.

Standard-Tilton Milling Co.,

MADISON COUNTY

Appellant.

TRIAL JUDGE

HON. M. R. SULLIVAN.

Term No. 53.

In the Appellate Court.

Agenda No. 57.

Fourth District.

October Term, 1914.

Matilda M. Yackel and George Yackel, :
Helen Yackel, Elmer Yackel, Con- :
stance Yackel, Adolphus Yackel, :
Walter Yackel, and Ralph Yackel, :
Minors by Matilda M. Yackel, their :
next friend. :

Appellees. :

vs. :

Standard-Tilton Milling Company, :
Appellant. :

* Appeal from the :
Circuit Court of :
Madison County, :
Illinois. :

McBride, P.J.

The plaintiff in this suit recovered a judgment against the defendant for injuries sustained by reason of defendant's building settling and tipping over, injuring the plaintiff's building; judgment was recovered because of the negligent construction of the defendant's elevator.

The questions involved in this case were before this court and decided at the October Term, 1913, in the case of James F. Starr et al vs. Standard-Tilton Milling Company, 183 App., 464.

It will be observed that the appellant in the suit now under consideration is the same appellant in the case above referred to as having been decided by this court at a former term. The questions of law and fact involved in this case are substantially the same as the questions involved in the case of Starr et al., vs. Standard-Tilton Milling Company, Supra, and we think that opinion is decisive of the questions involved in this case and controls

Fourth District.

October Term, 1911.

William M. Yackel and George Yackel,
Helen Yackel, Elmer Yackel, Con-
stance Yackel, and Ralph Yackel,
Plaintiffs, vs.
The Standard Elevator Company,
Defendant.

Appellants.

vs.

The Standard Elevator Company,
Respondent.

Standard Elevator Co.

The plaintiff in this suit recovered a judgment

against the defendant for injuries sustained by
reason of defendant's building settling and slipping away,
injury to the plaintiff's building; judgment was recovered
because of the negligent construction of the defendant's
elevator.

The questions involved in this case are:

First: This court and decided at the October term, 1911, in
the case of James T. Starr et al. vs. Standard Elevator
Company, 183 App., 454.

It will be observed that the question in the

case above referred to is the same question as the
one above referred to as having been decided by this court
at a former term. The questions of law and fact involved
in this case are substantially the same as the questions
involved in the case of Starr et al., vs. Standard Elevator
Company, supra, and we think that opinion is con-
clusive of the questions involved in this case and we think

the rights of the parties herein. Reference is hereby made to the foregoing cases for the statement, argument and opinion of this court upon the questions involved herein. In view of the foregoing opinion, similarity of the facts therein and the facts in this case we are of the opinion that the judgment of the lower court should be affirmed.

JUDGMENT AFFIRMED.

(Not to be reported in full).

The rights of the parties to the contract are not affected by the fact that the contract is not in writing. In view of the foregoing opinion, the facts therein and the facts in this case are of the opinion that the judgment of the

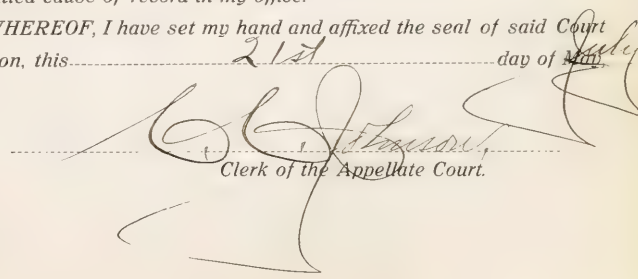
court should be affirmed.

THOMAS L. SMITH

(Not to be reported in full).

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court
at Mt. Vernon, this 21st day of July
A. D. 1915.


Clerk of the Appellate Court.

10

194 HA 273

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fifteen, the same being the 23rd day of March, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Thomas M. Harris, Presiding Justice.

Hon. Harry Higbee, Justice.

Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the 21st day of May, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

194 I.A. 273

ERROR TO
APPEAL FROM

vs.

No. 72

October Term, 1914.

Circuit COURT

Williamson COUNTY

TRIAL JUDGE

HON. Benjamin W. Pope

IN THE APPELLATE COURT
FOURTH DISTRICT.

CITIZENS BANK OF JOHNSTON
CITY, ILLINOIS, Appellant.

V3.

JOHN E. CARR.

Impleaded with Appellee.
FLORA CARR.

Appeal from the Circuit
Court of Williamson County.

McBride, J.

This is an appeal from a judgment entered in the Circuit Court of Williamson County at the February Term 1914 in an action brought by appellant against appellee John E. Carr and his wife Flora Carr on a promissory note. On April 26th, 1913, in vacation, judgment by confession was entered against appellee and his wife and at the July Term following judgment was opened and appellee was allowed to plead to the declaration. A plea was afterwards filed by appellee in which he claimed that he had paid the note. Issue was joined and the cause was heard by a jury and a verdict returned finding the issues for the defendant. Judgment was entered on the verdict and this appeal follows.

Appellant contends that the verdict of the jury is manifestly against the greater weight of the evidence, and that the Court erred in refusing instructions offered by appellant, and in giving certain in-

IN THE APPELLATE COURT

FOURTH DISTRICT

CITIZENS BANK OF JOHNSTON

CITY, ILLINOIS,

Appellant,

vs.

JOHN E. GARY,

Appellee.

Appeal from the Circuit Court of Williamson County.

WILLIAM J. ...

This is an appeal from a judgment entered in the Circuit Court of Williamson County at the Twenty Term 1914 in an action brought by appellant against appellee John E. Gary and his wife Alice Gary on a promissory note. On April 28th, 1913, in violation of the laws of this State, the said appellee and his wife and at the July Term following judgment was entered against the said appellee and his wife and the said appellee was allowed to give to the said appellee a promissory note in which he stated that he had paid the note. Issue was joined and the cause was heard by a jury and a verdict returned finding the issues for the defendant. Judgment was entered on the verdict and this appeal follows. Appellant contends that the verdict of the jury is manifestly against the greater weight of the evidence, and that the Court erred in refusing to grant a new trial, and in giving certain instructions.

structions offered by appellee.

Appellant ~~is~~^{was} a banking institution located at Johnston City. Ed Duncan ~~is~~^{was} President of the bank and Mark Duncan, his son, ~~is~~^{was} Cashier. On September 15th, 1909 appellee, who was a stock holder and depositor of the bank, obtained a loan from appellant and gave the note in question for \$3000.00, due ninety days after date, with his wife Flora Carr as surety. ~~A power of attorney was attached to the note authorizing judgment by confession.~~ At the time the note was given appellee owned stock in the bank and kept a checking account. He made deposits from time to time, drew checks against his account, and, it seems, paid but little attention to his account. He was also President of a private bank at Loggotee, Illinois, ~~and interested in one or two other banks.~~ Rex Duncan, another son of Ed Duncan, was the Cashier of appellee's bank at Loggotee. ~~The testimony, which is~~
~~highly conflicting, shows that~~ Prior to the time of bringing this suit the bank requested appellee to reduce his overdraft. Appellee denied that he had an overdraft at the bank and, upon investigation, it was found that there were charged to his account many items, which he claimed he had never authorized and of which he had no knowledge. ~~These items consisted of drafts which had been drawn against the National Weekly, a newspaper owned and operated by appellee and others, for money sent to appellee's bank at Loggotee and for some interest due on this note, which was marked paid and charged to appellee's account.~~ Appellee denied that he authorized charging of these various items to his account, and

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1. *Journal of the American Medical Association*, 1997; 278: 1019-1024.

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doi:10.1002/ajim.10014

denied that he received any credit for or benefit from the money sent to his bank at Loogootee at the request of Rex Duncan, the Cashier.

In August 1911 appellee paid appellant \$1000.00 and later he transferred to it eighteen shares of bank stock for the sum of \$1800.00, for which he was to receive credit. There were also dividends on the stock transferred amounting to \$72.00, and dividends on other stock which he held amounting to \$60.00, which were placed to his account and he claimed to be entitled to credit for fire and burglarly insurance paid by him for the benefit of the bank amounting to \$82.36. The total sum thus paid by him amounted to \$3014.36. Appellant admitted the receipt of the \$1000.00 in money, the \$1800.00 for the bank stock, dividends amounting to \$132.00, and ~~did~~ not dispute the claim for money paid for burglarly and fire insurance, but stated that no claim was ever made for those items. Appellant contended, however, that the \$1000.00 was to pay a note held by Ed Duncan for money loaned by him to appellee and that the other money was to apply on the overdraft of appellee.

The principal questions ~~in this case, arising from the pleadings and the evidence,~~ ^{were} the correctness of appellee's account as kept by the bank and whether the payments made by appellee should be applied on the note or the overdraft, if there was an overdraft. ~~Upon both questions the evidence is highly conflicting.~~ Ed Duncan, the President of the bank, and Mark Duncan, his son, the Cashier, testified to the different trans-

denied that he received any credit for or benefit from the money sent to his bank at Rochester at the request of Rex Denson, the Cashier.

In August 1911 appellee with appellant \$1000.00 and later he transferred to it eighteen shares of stock for the sum of \$1800.00, for which he was to receive credit. There were also dividends on the stock transferred amounting to \$78.00, and dividends on other stock which he held amounting to \$10.00, which were placed to his account and he claimed to be entitled to credit for life and partially insurance paid by him for the benefit of the bank amounting to \$83.33. The total sum shown to him amounted to \$2011.33. Appellant admitted the receipt of the \$1000.00 in money, the \$1800.00 for the bank stock, dividends amounting to \$128.00, and does not dispute the claim for money paid for partially life and insurance, but stated that no claim as even made for those items. Appellant contends, however, that the \$1000.00 was to pay a note held by Rex Denson for money loaned by him to appellee and that the other money was to apply on the overdraft of appellee.

The principal question in this case, arising from the pleadings and the evidence, and the correctness of appellee's account as kept by the bank and whether the payments made by appellee should be applied on the note or the overdraft, if there was an overdraft. The court concludes the evidence is slightly conflicting, Ed Denson, the President of the bank, and Rex Denson, his son, the Cashier, testify to the different trans-

actions with appellee and state that they had repeatedly requested appellee to take up his overdraft and that the payments made were for that particular purpose. They further testify that all of the items charged to appellee's account were authorized by him, with the possible exception of one or two, and that he had full knowledge that the payments had been credited on his overdraft. Appellee directly contradicts the statements of both these witnesses.) No other testimony was heard and it was peculiarly a question for the jury to determine which should be given the greater weight. By a long line of decisions our Courts have held that a judgment should not be reversed upon appeal unless the verdict is manifestly against the weight of the evidence. (Eggmann vs Nutter, 169. Ill., App. 116; Donnelly vs. Chicago City Ry Co., 163 Ill. App. 7; Healea vs. Keenan, 244 Ill., 484, and cases there cited) In this case if appellee is to be believed the payments by his express directions, were to be applied on the note. If no directions had been made as to its application it would have been discretionary with the bank whether it should be applied on the note or other indebtedness. If there had been no indebtedness other than the note there could be no question as to its application. This testimony raises the issue as to the correctness of the overdraft. Upon this question the evidence is as conflicting as the other. The bank books, receipts and other evidence of transactions add no light to the controversy. The entire case hangs upon the statements of the opposite parties and it is the province of the jury to determine the

the Supreme Court in *United States v. United Fruit & Sugar Corp.*, 321 U.S. 1, 64 S. Ct. 1342, 38 L. Ed. 2d 109 (1944), which held that the government's burden of proof in a criminal case is not satisfied by a mere showing of a preponderance of the evidence, but that it must be established beyond a reasonable doubt. This principle is also applicable in civil cases where the government is the plaintiff, as in *United States v. United Fruit & Sugar Corp.*, 321 U.S. 1, 64 S. Ct. 1342, 38 L. Ed. 2d 109 (1944).

question of creditability.

In view of all the evidence in the case we cannot say that it is manifestly against the greater weight of evidence and we do not feel justified in so holding.

~~It is next~~ ^{was also} ~~contended that the Court erred in~~
~~admitting evidence objected to by appellant. Rex Duncan,~~
~~a son of Ed. Duncan, was for a time Cashier of appellee's~~
~~private bank at Loogootee, Illinois.)~~ Mark Duncan testi-
fied that while Rex Duncan was ^{of the Loogootee bank} Cashier he requested him
to send to appellee's bank at Loogootee \$2000.00 which
was done, and the same charged to the account of appellee.
Appellee contends that Rex Duncan had no authority to
get the money and that he had never received any credit
for it at the Loogootee bank. Appellee was asked con-
cerning the whereabouts of Rex Duncan and stated that he
had gone away shortly after the case came up. Appellant
objected to this testimony, but his objection was over-
ruled. Appellee further testified that in a conversation
at the bank he told Ed. Duncan that "they had skinned me
out of a lot of money", and "that Rex Duncan had done it".

It is insisted that this testimony was highly prejudicial
to appellant. The question of the authority of Rex Duncan
to borrow money and charge it to the account of appellee
was an issue. It was not improper to show appellee's
inability to produce him as a witness and that portion of
the testimony was competent for that purpose. Appellee's
statement that "they had skinned me out of a lot of money"
was a part of a conversation held with Ed Duncan in the
bank when the question of the correctness of the over-
draft was being discussed. Both parties testified to

In view of all the evidence in the case we cannot say that it is necessarily against the greater weight of evidence and we do not feel justified in so holding.

It is also true that the appellant's testimony is not necessarily true. The appellant testified that he had never received any credit for it at the Woodstock bank. Appellee was asked concerning the whereabouts of Rex Duncan and stated that he had none any shortly after the case was up. Appellee objected to this testimony, but his objection was overruled. Appellee further testified that in a conversation with the bank he told Mr. Duncan that "they had advanced me out of a lot of money", and "that Rex Duncan had none". It is insisted that this testimony is highly prejudicial to appellant. The question of the authority of Rex Duncan to borrow money and charge it to the account of appellee was an issue. It was not improper to show appellee's inability to produce him as a witness and that portion of the testimony was competent for that purpose. Appellee's statement that "they had advanced me out of a lot of money" was a part of a conversation held with Rex Duncan in the bank when the question of the correctness of the overdraft was being discussed. Both parties testified to

conversations had concerning this overdraft. We think this evidence was proper and that the court did not err in admitting it.

Complaint is also made of the giving of appellee's second and fifth instructions. By the second instruction the jury was told that if appellant had overcharged appellee's account at the bank without his permission or authority to an amount equal to or in excess of the sum of \$1800.00, and appellee had not afterwards ratified the action of appellant in so doing, then appellee would be entitled to have the sum of \$1800.00 arising from the sale of the bank stock credited on the note. Strictly speaking this instruction is not correct, but under the issues presented and in view of the evidence, we do not think the jury was misled by it. If there had been an undisputed overdraft of any amount, this instruction would have precluded the jury from considering whether or not payments were to be applied on the overdraft, but the entire overdraft was disputed by appellee and the jury must have found in his favor on that question. If so, the giving of this instruction was harmless.

What we have heretofore said in discussing the FIRST QUESTION disposes of the objection made to the giving of instruction No. 5. We think the question of the justness of the overdraft charged against appellee's account was properly at issue in this case and this instruction was properly given.

For the reasons above given appellant's instructions numbered 1 and 2 were properly refused. Besides, the question of where the burden of proof lay on the

conversations had concerning this overdraft. In this
this evidence was proper and that the court did not see
in admitting it.

Complaint is also made of the giving of
appellee's second and fifth instructions. By the second
instruction the jury was told that if appellee had not
charged appellee's account at the bank without his per-
mission or authority to an amount equal to or in excess
of the sum of \$1800.00, and appellee had not otherwise
satisfied the action of appellee in so doing, then ap-
pellee would be entitled to have the sum of \$1800.00
arising from the sale of the bank stock credited on the
note. Finally stating this instruction is not correct,
but under the issues presented and in view of the evidence,
we do not think the jury was misled by it. If there had
been an undisputed overdraft of any amount, this instruction
would have instructed the jury to find in favor of appellee
or not payments were to be applied on the overdraft, and
the entire overdraft was disputed by appellee and the
jury must have found in his favor on that question. If
so, the giving of this instruction was harmless.
That we have heretofore said in discussing the
FIRST QUESTION disposed of the objection made to the giving
of instruction No. 5. We think the question of the prop-
riety of the overdraft charged against appellee's account
was properly at issue in this case and this instruction
was properly given.
For the reasons above given appellee's instruc-
tions numbered 1 and 2 were properly refused. Finally,
the question of where the burden of proof lay on the

different issues was fully considered in other instructions given.

The judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

(Not to be reported in full.)

THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION
PUBLISHED WEEKLY
CHICAGO, ILL., U.S.A.

1922

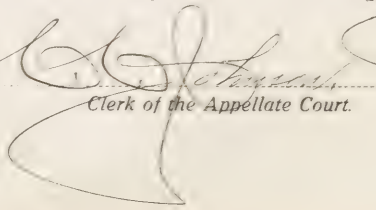
The Journal of the American Medical Association is published weekly.

Subscription prices

(Not to be repeated in full.)

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 21st day of May, A. D. 1915.


Clerk of the Appellate Court.

THE CENTRAL TRUST COMPANY OF ILLINOIS, as Receiver in Bankruptcy for the Plaintiffs, WILLIAM WATERBURY and JOHN McBRIDE, doing business as CARTERVILLE WASHED FUEL COMPANY,
Defendants in Error,

vs.

EDWARD E. KUGLIN and LOUIS BERNSTEIN,
Plaintiffs in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

194 I.A. 294

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

William Waterbury and John McBride, doing business as the Carterville Washed Fuel Company, sued the defendants, Edward E. Kuglin and Louis Bernstein, in the Municipal court, to recover the value of ~~certain~~ coal sold and delivered to the defendants in 1911. The defense, as stated in the affidavit of merits, was that the Carterville company did not deliver the kind of coal contracted for, but delivered an inferior grade of much less value. Before the trial, the Central Trust Company of Illinois, as receiver in bankruptcy for the Carterville company, was substituted as party plaintiff. Upon a trial before the court and a jury, a verdict was returned in favor of the plaintiff for \$270, and from a judgment entered upon that verdict, the defendants have sued out a writ of error.

The sole contention of the plaintiffs in error is that *The only question raised was that* "the verdict as returned by the jury is a compromise verdict, and cannot be justified on any theory of the evidence offered." No brief has been filed by defendant in error, but after an examination of the evidence, we are of the opinion that this alleged error is not well assigned. *The evidence showed* It was shown, without dispute, that there was originally a written contract between the parties, by which the Carterville company agreed to sell and deliver to defendants their "requirements, estimated at 1000 tons" of coal *to be* "to be used for steam purposes" in a building of the defendants in Chicago.

between July 18, 1912, and March 31, 1913, ~~the kind of coal to be "Cervind-Whites Pocahontas run of mine,"~~ and deliveries to be made in such quantities as ^{might} ~~may~~ be ordered from time to time at the price of \$3.85 per ton, ~~but with the following qualification as to price:~~ "The price named in this contract is based on ^{the} ~~the present~~ freight rate of \$4.05 per ton from mines to seller's yard, ^{to} ~~and shall~~ advance or decline as ^{the} ~~said~~ rate ^{might fluctuate} ~~may~~ advance or decline, during the life of this contract." It was also shown, without dispute, that up to September 1, 1912, the Carterville company delivered to the defendants coal of the kind and character prescribed by the contract, which was paid for at the contract rate. The ~~only~~ dispute between the parties arises out of the delivery of ninety tons of coal ~~by the Carterville company to the defendants~~ during October and November, 1912. The plaintiff's evidence ~~as to this transaction~~ ^{to} ~~prove~~ that in September, 1912, one of the defendants complained that the coal furnished prior to that time was not good coal, that he then instructed the plaintiff to send "Blue Valley" or "Bluefields" Pocahontas coal instead of Cervind-Whites Pocahontas, that the 90 tons in question were furnished in pursuance of this order or direction, that ^{such} ~~such~~ coal was of the grade ~~thus~~ ordered, and that ^{the} ~~the~~ value of the same was four dollars a ton. ^{while} ~~On the~~ other hand, the defendants and an engineer in their employ testified that the coal so delivered was not Pocahontas coal, but "looked like screenings," and was, in fact, of the grade known as "No. 5 washed nut," worth \$1.75 to \$2.00 per ton.

If the jury believed the evidence of the plaintiff's witness on this point, they were justified in rendering a verdict for \$340. If they believed the evidence of the defendants, the verdict should not have been more than \$180. The defendants admitted, however, that they did not know where the ninety tons of coal in question came from, and did not know the cost of transport-

ing such coal from the mines in West Virginia to Chicago. It is a reasonable inference from the testimony that the coal was shipped from West Virginia; and in view of the statement in the contract that the freight rate upon such shipments was \$2.05 per ton, it may well be that the jury refused to credit the statements of defendants that such coal could be bought in Chicago for less than the freight charges. If they did refuse to believe such evidence, the only evidence as to the value of the coal was that of the plaintiff's witness, and the defendants cannot be heard to complain that the jury did not return a verdict as large as the plaintiff's evidence would have warranted.

Counsel for plaintiffs in error cite three cases, in each of which suit was brought upon a note, or other like contract, to recover a fixed amount due by the terms of the note or contract, and a verdict for less than such amount was returned. In each of such cases, the judgment entered upon the verdict was reversed upon the ground that the plaintiff was entitled, under the evidence, to all, or none, of his claim. But in each of such cases, the error was assigned by the plaintiff, and not by the defendant. The plaintiff in this case is not complaining, and the defendants cannot complain of an error which is in ^{their} favor. ~~xxxxxx~~

The judgment of the municipal court will be affirmed.

AFFIRMED.

183 - 26086
20094.

A. M. deBEAUMAIS, Defendant in Error,

vs.

ERRON TO

MUNICIPAL COURT

OF CHICAGO.

CHICAGO SCHOOL OF PHYSICAL EDUCATION AND EXPRESSION,

Plaintiff in Error.

1831A.296

MR. JUSTICE PITCH delivered the opinion of the court.

action brought by against the

The defendant in error, hereinafter called the plaintiff,

recovered a judgment ^{in favor of} against the plaintiff in error, hereinafter called the defendant, for \$400.00, for the value of services claimed to have been rendered by him to the defendant during the years

1909, 1910 and 1911, as a physical instructor in the defendant's school. *the defendant lived out a milt error. The conduct of*

the plaintiff was regularly employed at defendant's school in giving fencing lessons a few hours a week, at the rate of \$2.50 an hour, and claimed that "in the spring" of 1909, the lady at the

head of the school employed him at the same rate to give instruction to pupils of the school in what is called "setting up exer-

cises," consisting of "exercises of the muscles of the body; bending and stretching the arms and legs: bending, twisting, etc.,"

with the understanding, however, that as the school was then in debt, his pay for the same should "lie dormant" until the end of the year

1910, by which time it was expected the defendant would be in a better financial condition as the result of the operation of a summer

school at Laugatuck, Michigan. The defendant did not deny that the plaintiff rendered services of the kind above stated, but claimed

that when the plaintiff proposed to render such additional services, he was told that the school could not afford to pay for them, where-

upon, being already an instructor in the school, he offered to teach the "setting-up exercises" without any additional compensation until

the school was more firmly established, and that this offer was accepted. ^{and} There is a sharp conflict in the evidence as to these

respective claims. During the school year of 1909-1910, it appears that the plaintiff was paid for his fencing lessons at irregular intervals and in odd amounts, and defendant admitted that it owed him a balance of \$50 for such lessons given during the school year of 1910-1911. It is apparent from the amount of the verdict that the jury allowed the plaintiff the full amount of his claim, as shown by the amended statement of claim, plus the \$50 admitted to be due for fencing lessons, minus the sum of \$175 paid to him in odd amounts as above stated; from which it is evident that the jury accepted in toto the plaintiff's theory of the case. Without discussing the merits of the case, or expressing any opinion on the weight of the evidence, we think the conflicting nature of the evidence is such as to require the record to be free from substantial errors that may have affected the verdict of the jury.

At the beginning of the trial, the court permitted the plaintiff, over the objection of defendant's counsel, to relate a conversation between himself and the head of the school, relating entirely to a personal matter between them, viz: the indorsement by him of certain notes which she gave for the purchase of certain shares of stock in the defendant corporation. The excuse given by plaintiff's counsel for the introduction of this wholly irrelevant testimony, was that it had a tendency to explain the subsequent actions and conduct of the parties. We think its only tendency was to influence the jury to the prejudice of the defendant. The evidence was entirely incompetent and it was error to admit it, over defendant's objection.

At another time, the plaintiff was permitted to testify that he had made a personal loan of \$50 to the head of the school. This is open to the same objection and defendant's motion to strike it out should have been sustained.

~~It appears from the evidence that although the plaintiff~~
~~claimed that defendant employed him in the spring of 1909 to give~~
~~instruction in "setting-up exercises," yet in August of that year,~~
109
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the first of these is the fact that the

the second is the fact that the

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Court *to the defendant*
he prepared and mailed to the defendant, a long letter, outlining a proposed plan for giving such instruction at defendant's school, in which he enumerated and enlarged upon the benefits that would follow its adoption, and the methods he would adopt if his suggestions were put in operation. In the course of this letter, he said: "The first thing that will present itself to you, I know, is the question of remuneration! Well, don't worry about that. If your finances are flourishing, you can pay me, if you can't, I'll teach all the same!!! If you like, you can pay me in postage stamps or in shares of your stock." ~~At the close of all the evidence and after the oral instructions had been given, defendant's counsel requested the court to give an instruction "as to the right of the plaintiff to recover where services are to be paid for in postage stamps or capital stock."~~ To this request, the court replied, apparently in the hearing of the jury: "In case giving instructions on that. You can't make a claim on one line in a letter. * * * I can't base an instruction on that letter." A xxx minute later, however, the court said: "If there was an agreement between the parties that plaintiff was to take no payment any articles other than money he would not be entitled to recover money." Whether this was merely a statement to counsel, or a part of the oral instructions, is not clear from the record. The statement is not a correct statement of the law (McKinnis v. Lums, 230 Ill. 544), but it was more favorable to the defendant than it was entitled to, and therefore not error of which it can complain. But the remarks of the court preceding this statement should not have been made in the hearing of the jury. They amounted to an expression of opinion by the court that the above quoted portion of the plaintiff's letter was of no importance whatever, and should be disregarded, whereas, in fact, it certainly had a tendency to contradict the testimony of the plaintiff to the effect that a definite agreement had been made in the spring of 1909.

For the errors indicated, the judgment of the principal court will be reversed and the same remanded.

REVEREND AND HONORABLE.

THE UNIVERSITY OF CHICAGO PRESS

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2036
203 - 20183.

CITY OF CHICAGO,
Plaintiff in Error,

vs.

H. W. SMITH,
Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

194 I.A. 305

MR. PRESIDING JUSTICE MASON delivered the opinion of the court.

Return by The City of Chicago ^{against} ~~sued the defendant~~, H. W. Smith, to recover a penalty for ^{the} a violation of a city ordinance. After hearing ~~the~~ ⁷¹⁰⁰ evidence, the trial court gave judgment ⁷¹⁰⁰ for the defendant, ~~but~~ ^{and} the City sued out ^a this writ of error, ~~and insists that the finding and judgment are contrary to the evidence. There is nothing in the record before us to show that such is the fact. The stenographic report of the trial does not show that any ordinance of the city was offered in evidence or considered by the court. Hence there is no proof that anything the defendant did, or omitted to do, constitutes a violation of any ordinance of the city.~~

Upon appeal or writ of error, the finding and judgment of the trial court are presumed to be correct until the contrary is made to appear. If the ordinance alleged to have been violated, ^{which} ~~which is~~ not set out in the plaintiff's statement of claim, but ^{was} ~~is~~ merely referred to as "Section 1841 of the City Code of 1911" - ~~was~~ ^{was} neither offered nor considered in evidence, manifestly the only finding and judgment the trial court could give would be for the defendant. If the ordinance was considered in evidence, under the rule of judicial notice that obtains in the Municipal court, and the plaintiff desired to raise the question whether the trial court erred in finding for the defendant upon the evidence presented, it was its duty to prepare and have signed a complete statement of the facts, or a stenographic report of all the evidence, including the ordinance of which the court took judicial notice.

The judgment of the municipal court will be affirmed.

AFFIRMED.

2015-9
250 - 20159.

H
JOHN J. HABERER,
Defendant in Error,
vs.
G. W. KUNSTMAN,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

194 I.A. 306

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

Action by & against
~~This suit was brought~~ to recover a real estate broker's commission, as provided for by a written contract for the exchange of real estate executed by the defendant and a man named Julian, *which the latter* by the terms of ~~the contract~~, ~~Julian~~ agreed to convey his property to defendant, subject to "an encumbrance of \$10,500 now on said property," *the* which ^{he} defendant agreed to assume. *He understood that* When the title was examined, ~~the defendant's attorney pointed out, in his opinion of title,~~ *at applicant* that the property was encumbered by two trust deeds aggregating \$10,500, instead of one; whereupon the defendant refused to consummate the exchange, claiming that this fact made a material difference. ~~The whole controversy turns upon the effect of the words above quoted as used in the contract.~~

Upon the trial, the defendant introduced evidence as to ~~conversations between the parties prior to the execution of the contract, regarding encumbrances upon the property, and the plaintiff introduced evidence upon the same point contradicting the plaintiff's evidence.~~ It is contended that the court erred in admitting this evidence. We think the error is not well assigned. The plaintiff did nothing more than meet the evidence introduced by the defendant, and if there was error in admitting it, the error was invited by defendant, and he is not, therefore, in a position to complain of the ruling (O. & A. R.R. Co. v. Lewandowski, 190 Ill. 301; Cook v. Lantz, 118 Ill. App. 478; Policemen's Benevolent Ass'n. v. Ryce, 115 Ill. App. 98, affirmed 213 Ill. 9).

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[Faint, illegible text]

It is urged that upon the facts above stated, the court should have directed a verdict for the defendant, for the reason that the defendant was justified in refusing to carry out the contract and that therefore, the plaintiff had not earned his commission. In Pox v. Ryan, 240 Ill. 391, it was said, quoting from Wilson v. Mason, 188 Ill. 304: "The true rule is, that the broker is entitled to his commissions if the purchaser presented by him and the vendor, his employer, enter into a valid, binding and enforceable contract." Such a contract was made in this case. The fact that the contract is for an exchange of properties can make no difference, except that neither party was bound to consummate the exchange if the title to the property of the other was not such that he could convey a good title to the other. In our opinion, the mere fact that the encumbrance of \$10,500 on Sultan's property was evidenced by two trust deeds instead of one, is not a good objection to the title, and did not prevent Sultan from conveying the property so as to vest in defendant a "good and sufficient title," as the contract provides. By the terms of the contract, the seller agreed to "assume an encumbrance of \$10,500 now on said property." The evidence shows that there was no single encumbrance of that amount then "on the property." In the construction of contracts, effect must be given to all the language employed. The construction contended for by defendant's counsel would give effect only to the words "an encumbrance of \$10,500" and no effect whatever to the words "now on said property." Finding no reversible error in the record, the judgment of the Municipal court will be affirmed.

APPROVED.

Page 107

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

MERRITT O. HOOVER, ~~Plaintiff~~,
Plaintiff in Error,

vs.

MRS. I. BUCKMAN,
Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

194 I.A. 308

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

Adian by

~~The plaintiff~~, Merritt O. Hoover, a physician, ~~sued the~~

defendant, Mrs. Ida Buckman, in the Municipal court to recover a balance of \$11.25, claimed to be due for services rendered in the treatment of the defendant's eight-year-old child. The defendant admitted the services were performed, but claimed they were "valueless" because of the alleged want of ordinary care and skill on the part of the plaintiff, and interposed a claim of set-off, based upon the alleged fact that the child died "as a result of the negligence of the plaintiff," whereby, it was claimed, the defendant lost the services of the child during her minority. Upon a trial before the court ~~without a jury~~, a finding was entered against the plaintiff as to the amount claimed by him, and against the defendant as to her claim of set-off, and a judgment was entered in favor of the defendant for costs. *And* the plaintiff has sued out ~~this~~ writ of error.

~~The defendant has filed no appearance in this court, and no question, therefore, is raised as to that part of the finding and judgment disposing of the defendant's alleged claim of set-off. As to the remainder of the finding and judgment, we are unable to find any support for the same in the evidence contained in the record before us. It appears, without contradiction, that the plaintiff was employed by the defendant to treat her child; that the child was suffering from tonsillitis; that after treating her for several days, she was taken to a hospital, where an operation was performed on her tonsils; that the next day, the defendant took the child~~

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

INVESTIGATION OF THE ALLEGED VIOLATION OF THE
ANTITRUST LAWS BY THE UNITED STATES STEEL CORPORATION

1911 A. 308

REPORT OF THE
ATTORNEY GENERAL

THE UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

INVESTIGATION OF THE ALLEGED VIOLATION OF THE

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home, and for three days thereafter she played around like other children; that during the night of the third day following the operation, the plaintiff was called to the defendant's house, and found the child suffering from a high fever, with symptoms of pneumonia; that a nurse was at once engaged, and that the plaintiff called several times during the next day and the day following; that on the sixth day following the operation - being the third day of the fever - the plaintiff noticed symptoms of diphtheria; that he at once administered antitoxin, but the child did not improve; that the next day, he gave more antitoxin, and then told the defendant the child was suffering from diphtheria; that defendant called in a specialist; that a tube was inserted in the child's larynx and the next day the operation of tracheotomy was performed with the assistance of another physician called by the plaintiff; that two days later, the child died; that the plaintiff rendered an itemized bill to defendant for his services, amounting to \$103, and that defendant made no objection to the bill, but asked for time in which to pay it, and later paid on account of the same, in small amounts, the sum of \$30, leaving a balance due the plaintiff of \$103. The plaintiff testified positively that the earlier symptoms of the child's ailment were those of pneumonia; that he examined the child's throat several times each day, but that there were no symptoms of diphtheria present until just before he administered the antitoxin. Two other physicians testified that the plaintiff's treatment was the usual and customary treatment in such cases, was "absolutely necessary" and was "the skillful thing to do under the circumstances."

~~The only other evidence in the record is the testimony~~
~~of the defendant and her daughter, and they merely testified that~~
the plaintiff did not tell them that the child was suffering from diphtheria, but insisted that she did not have that disease, until the next day after the antitoxin was administered, and that he re-

fused to permit them to call another physician. Their evidence is flatly contradicted by that of the plaintiff; but even if it is true that the doctor concealed from them the real nature of the disease, that fact, of itself alone, does not tend to prove that he did not exercise reasonable care and skill in his treatment of the child. There is not a scintilla of evidence tending to prove that another physician could have done any better than the plaintiff did, under the circumstances, or that any other physician, if called, would have given the child any other or different treatment. The mere fact that an unfavorable result ensued does not raise any presumption of negligence or lack of skill on the part of the plaintiff, and in the absence of any evidence tending to overcome the prima facie case made by the plaintiff, he was clearly entitled to a finding and judgment in his favor.

It appearing from the evidence without dispute that a statement of account was rendered to the defendant, and that she not only acquiesced in the statement as rendered, but made partial payments on the same, the judgment of the Municipal court will be reversed with a finding of facts, and judgment will be entered in this court in favor of the plaintiff for \$103 and costs.

REVERSED AND JUDGMENT HERE.

Findings of facts to be incorporated in the judgment: The court finds from the evidence that the plaintiff rendered to the defendant the services mentioned in the plaintiff's statement of claim; that the usual, customary, and reasonable value of such services at the time and place they were rendered, was \$103; that the defendant received from the plaintiff an itemized statement of account for the same, which she retained without objection and afterwards paid \$30 on account thereof; and that the remainder of \$103 was due and payable to the plaintiff from the defendant at the time of the commencement of this suit in the Municipal Court of Chicago.

It is requested that you advise the Bureau of the results of your investigation.

[illegible]

VINCENT BENDIX,
Appellant,
vs.
STAYER CARRIAGE COMPANY,
a Corporation,
Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

194 I.A. 310

MR. PRESIDING JUSTICE FITZ delivered the opinion of the court.

action brought by
against them is recovery
for the breach of a
contract to furnish
automobiles for
sale.

~~This is an appeal by the plaintiff, Vincent Bendix, from a judgment of the Municipal court upon a directed verdict in favor of the defendant, Stayer Carriage Company. The case is in this court for the second time. Upon the former appeal, the only question presented was whether the amended statement of claim stated a cause of action. (Bendix v. Stayer Carriage Co., 174 Ill. App. 890.) The substance of the statement of claim is fully set forth in the opinion filed in that case, and it will be unnecessary, therefore, to repeat it at this time. We there held that the contract for the sale of defendant's automobiles, which forms the basis of this suit, is not a contract of agency in the ordinary sense; that it is apparent from the provisions of the contract "that the parties intended that Bendix should not act as the agent of defendant in making sales, but should act entirely for himself, in his own name and on his own responsibility; that he should buy outright from the defendant and pay cash on delivery for all such cars as his trade would require, which should not be less than ten cars during the period prior to January 1, 1910." We also held that the contract was mutual and binding on both parties; that it was not an option, within the meaning of section 130 of the Criminal Code, and that the amended statement of claim states a good cause of action.~~

~~After the case had been reheard in the Municipal court, it came on for trial before the court and a jury, and evidence was~~

The evidence

~~introduced~~^{set} by the plaintiff tending to prove the following facts: that immediately after the contract was signed, the plaintiff gave the defendant an order for a sample car for exhibition and demonstration purposes, paid a cash deposit of \$50 at that time, and paid the remainder of the net purchase price, viz: \$1,000, in cash upon delivery of the same; that this car was not delivered, however, until June 12, 1909, at which time the season for the sale of 1909 cars was well advanced; that in the meantime, the plaintiff rented and opened a salesroom at the corner of 18th street and Michigan avenue, and signed a two years lease for the same, at a rental of \$1,000 for the first year, and \$1,100 for the second; that he hired salesmen, signed a year's contract with a daily newspaper for advertising space, advertised therein and in other papers, and prepared and sent out circular letters to prospective customers, etc.; that on May 15, 1909, he ordered four more cars from the defendant and paid a deposit of \$50 on each; that the first of these four cars was delivered about July 23, the second about August 17, the third sometime in September, and the last in the latter part of October; that at the time this order was given, the plaintiff had no order from any customer for any of the cars; that customers were found, however, by the plaintiff for all of them about as fast as the same were delivered; that during the summer of 1909, the president of the defendant company expressed dissatisfaction with some of the terms of the contract, especially the rate of discount allowed to the plaintiff, and requested the plaintiff to sign a new contract, such as defendant was "making with other dealers," which plaintiff declined to do; that in August, defendant raised the list price of its cars \$250; that soon after, Mr. Staver, the president of the defendant company, told the plaintiff it intended to "revise their lines and bring out new models" for the season of 1910, but when the plaintiff made inquiries about these changes, Mr. Staver declined

to give him any information regarding the same unless he would sign a new contract; that finally, in November, 1909, the plaintiff made a specific request of the defendant for catalogues for the 1910 models, as he wanted to make his plans for that year, but Mr. Staver replied: "When you fix up a contract you will get all the information that is necessary. We will build four and six cylinder cars. That is all (the information) you will get until you sign a new contract. You cannot continue this contract. It is unsatisfactory, and you will either sign a new contract or you will not get these cars;" that the 1909 season for selling automobiles was then practically over; that defendant had only two cars left in its factory, and these were unfinished: that defendant had discontinued making cars like the sample car then in use by the plaintiff; that on December 31, 1909, the plaintiff and his salesman went to the office of defendant for the purpose of making a deposit on five more cars, as required by the contract: that Mr. Staver was in his office at the time, but refused to see them, and that thereupon, the plaintiff tendered the sum of \$250 in currency to one of defendant's officers there present, as a deposit upon the purchase of five cars, and with the money tendered a written order for five cars, without giving any specifications, but stating that he was ready to do everything that was necessary to be done to comply with his contract; that this offer or tender was refused, the officer saying that he did not know anything about the plaintiff's contract; that a few days later, the defendant notified the plaintiff in writing that "on account of your (his) failure to comply with the contract," the defendant considered "the same hereby terminated." It was further shown that thereafter, and during the term specified in the contract, defendant sold 22 cars within the territory named in the plaintiff's contract, for \$40,828.50.

In view of this evidence, we think the court erred in directing a verdict for the defendant. The evidence fairly tends

to prove all the material averments of the amended statement of claim, and ~~was~~ therefore prima facie sufficient to entitle the plaintiff to recover. It is stated in the briefs of counsel for appellant, that the reason given by the trial judge for directing a verdict for the defendant, was that the contract "merely gave him (the plaintiff) the exclusive right to sell, not to buy," and that therefore he was not authorized to make a deposit on the purchase of any car until he "had a customer wanting a car." This view of the contract is not only contrary to the views expressed in the opinion heretofore filed (Bendix v. Staver Carriage Co., supra), but there is nothing in the contract to warrant such a construction. By the terms of the contract, the plaintiff was given the exclusive right to sell the defendant's cars within a specified territory. In consideration for this "grant," he agreed "to use all reasonable effort to promote and increase the sale" of such cars, to give defendant's cars "at least equal representation with any automobile handled by" him, and after a certain date, he was to have "the first refusal of at least five (5) motor cars each month," and after a certain other date, the "first refusal" of at least ten cars a month. For the same consideration he further agreed "to take delivery of or make deposit on a total of at least ten (10) Staver motor cars on or before the 31st day of December, 1906, otherwise this agreement shall immediately thereafter become null and void." In one clause of the contract, the defendant agreed to "protect the interest" of the plaintiff "against any other dealer" in the territory assigned to the plaintiff. We think these clauses of the contract clearly give the right to the plaintiff to buy from the defendant as many cars as he thought he could sell, whether he had any customers for the same or not. The defendant certainly could not complain if the plaintiff bought more cars than he could sell, provided the other provisions of the contract were faithfully

observed. These clauses clearly treat the plaintiff as a dealer in automobiles who, in return for the grant of exclusive rights within a specified territory, was required not only to use his best efforts to sell the defendant's automobiles, but also to "take delivery of or make deposit on" (i.e. to purchase) at least ten cars during the year 1909, under penalty of a forfeiture of his contract. The very terms of the eighth paragraph of the contract imply an agreement or understanding between the parties that if sales were not made as fast as was anticipated, the plaintiff must nevertheless place orders with defendant for at least ten cars during 1909, with the necessary deposit of \$50 per car, whether he had customers for them or not. A dealer would naturally be expected to order some cars in advance of their actual sale, so that they might be ready for immediate delivery to customers when found; and the proof shows that this is precisely what the plaintiff did, when, in May, 1909, he gave, and the defendant accepted, his order and deposit for four cars, long before he had customers for any of them.

It is urged by appellee's counsel that there is no proof that the tender of \$200 on December 31, 1909, was kept good by bringing the money into court. The word "tender" is used in two senses; one, to indicate an offer of money due upon a debt or account, and the other, an offer to perform a condition or stipulation in a contract. The tender in this case was of the latter character. It is true that money was tendered, but this was one of the things required to be done by the terms of the contract in order to keep it alive after December 31, 1909. Such a tender, or offer, was necessary to be made by the plaintiff, if he desired the contract to continue in force after December 31, 1909, and proof of such a tender, or offer, was necessary in order to show that the plaintiff was ready and willing to perform his part of the contract. Such an offer of performance is not, strictly speaking, a "tender"

in the sense in which that word is ordinarily used when it is said that a tender must be kept good by bringing the money into court.

It is also urged that the failure of the plaintiff to give specifications for the five cars ordered on December 31, 1909, made the order of that date insufficient as an offer of performance or tender. In view of the uncertainty then existing as to the nature and character of the cars defendant would have for sale after that date, we think the offer was sufficient when accompanied, as the evidence tends to prove was the fact, with an offer to do whatever else the defendant might require in order to comply with the contract. Moreover, the defendant did not object to the offer for any such reason. It gave no reason at the time for its refusal to accept the deposit and order, and in its letter, written ten days later, purporting to terminate the contract, merely assigned as its reason a general failure of the plaintiff to comply with his contract. It would have been difficult, if not impossible, for plaintiff, under the circumstances stated in the evidence, to have done more than he did do at that time, and we think the offer as made was sufficient to prevent a forfeiture of the contract.

It is also urged that the evidence fails to show that the plaintiff performed his part of the contract after December 31, 1909. The proof shows that the plaintiff declined to acquiesce in the cancellation of the contract, but elected to keep it alive for the benefit of both parties. Having notified the defendant to that effect, it was not the duty of the plaintiff to continue useless efforts to sell cars he knew he could not deliver, nor to continue the expense of a salesroom for the sale of defendant's automobiles. All that was necessary was that he keep himself in readiness to perform, if the defendant should change its position in regard to the matter. The evidence is prima facie sufficient to show that this was done.

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It is claimed that the evidence shows that plaintiff violated the contract by sending out certain circulars upon the letter heads and over the signature of the defendant. The proof shows that a few of such circulars were, in fact, sent out under the following circumstances: The plaintiff suggested to defendant the advisability of sending out such a circular letter, and the defendant agreed to prepare one and mail it, but did not do so. Plaintiff kept urging it to send them out, and finally the superintendent of the defendant company said to the plaintiff: "You can have this done down town and it will save us considerable trouble;" and thereupon gave the plaintiff one thousand of defendant's letter heads for that purpose. After a few of these had been sent out, the president of the defendant company ordered the further mailing of them stopped, calling the attention of plaintiff to the fact that he was not authorized by the contract to "issue any printed matter signed with the name of this company." None was mailed after that. Taking this evidence as true, there was no violation of the contract. But even if such conduct could be so considered, it was a question for the jury whether such violation was not waived by the subsequent actions of the defendant recognizing the contract as in full force and effect.

The contract provides that defendant "agree to reimburse" the plaintiff "to the extent of commissions and discounts herein provided on Staver motor cars sold" by the defendant in the territory assigned to the plaintiff. It is urged that the words "to reimburse" in this clause of the contract do not mean "to pay," but mean "to pay back." We think the contention is without merit. If the words "to reimburse" mean "to pay back," they would be meaningless when applied to sales made by the defendant. The intention of this clause clearly was to provide that if the defendant sold any cars in the plaintiff's territory during the life of the contract, it would pay to the plaintiff the same discount or commission as if he had him-

self sold such cars.

The judgment of the Municipal court will be reversed
and the cause remanded.

REVERSED AND REMANDED.

20313
275 - 20313.

CHARLES W. DUER,
Appellee,

vs.

CHICAGO COACH & SARRIAGE
COMPANY,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

1941 A. 314

~~This is an appeal from a decree of the circuit court, which finds that appellee is entitled to recover from appellant the sum of \$4,050.15, upon a contract entered into between them on December 15, 1904.~~ ^{finding was} Prior to 1904, appellee ~~was~~ ^{was} a chauffeur with considerable experience in the building and repairing of automobiles. In May, 1904, he secured a patent for an improvement in high-wheel automobiles, and in September following, he entered into a verbal arrangement with appellant, to construct a single car in appellant's factory for the purpose of demonstrating the practicability of appellee's invention, appellee to furnish his time, skill and experience, and appellant to furnish the necessary labor and materials. Under this arrangement, a car was constructed on the principle of appellee's patent, which, according to a catalogue issued later by appellant, "was run 15,000 miles under as severe a series of tests as could be devised." The catalogue also said: "It stood the test, and is without a doubt the most flexible car on the market today - a perfect wonder."

As soon as this car was finished and successfully demonstrated, the parties entered into a formal written contract, ~~dated~~ ^{dated} December 15, 1904. This contract granted to appellant the exclusive right to manufacture automobiles under appellee's patent, and under other patents then pending, during the life of such patents, "for ^{the} ~~the~~ ^{of the} ~~the~~ ^{the} considerations hereinafter severally mentioned," viz: appellant agreed to employ appellee as "superintendent of construction" and to pay him, ~~two~~ ^{ten} per cent. of the net selling price of the first twenty-five cars and a salary of \$10 per week, three per cent. of

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the net selling price of the next twenty-five cars and a salary of \$20 per week, and four per cent. of the net selling price of the next fifty cars and a salary of \$25 per week. The remainder of the contract is as follows: *Quick*

"6. After one hundred cars shall have been built under ^{these} patents, the said party of the second part (appellant) shall have the exclusive right to manufacture automobiles under the said patent, No. 220,100 during the life of the patent, and the said party of the second part shall have the right to manufacture automobiles of any description under the aforementioned patent for a bevel gear transmission, and the exclusive right to manufacture automobiles driven by a belt, rope or covered cable under the aforementioned patent for a bevel gear transmission, during the life of the patent, for a consideration of five per cent. of the net selling price of each car, for each patent used in each car, but the said consideration shall never be less than one thousand dollars (\$1,000) per year, irrespective of the number of cars built, after one hundred cars shall have been built.

"7. The said party of the second part shall render statements of account three times yearly on the first days respectively of January, May and September, showing the number of each car built and sold, and shall make settlements accordingly with said party of the first part.

and then bill and should not be forced
"8. It is hereby agreed that there is nothing in these articles that shall bind the said party of the second part to continue in the manufacture of automobiles under the aforementioned patents, should the product be impractical or unprofitable.

"9. In case the said party of the second part shall cease to manufacture automobiles or otherwise fail to make use of the right to manufacture under the aforesaid patents then any exclusive rights granted by this agreement shall be void."

In pursuance of this contract, appellant entered upon the construction of automobiles under appellee's patents, and continued to build such vehicles until April 16, 1910. The hundredth car was sold on July 24, 1909. Appellee was paid the salary specified in the contract, but received practically nothing from appellant on account of the stipulated royalties. Appellant made no statements of account to him, as required by the contract, and on September 3, 1909, appellee made a formal demand for such a statement of account. Appellant ignored the demand, whereupon appellee caused a demand to be made by his attorney. Appellant replied to the attorney's letter that "puer has made several kicks for a statement" and was told "that if he was short and needed money, he could draw

... ..

some on account;" that he (appellee) "knows the name of every customer," and "has been in a position to call upon the bookkeeper for a statement at any time;" and promised a statement "of the last 50 cars in the next few days." Not receiving such a statement, appellee left appellant's employ, and in December, 1909, ^{the} filed a bill in this case.

The bill sets forth the contract, the manufacture of cars under the same, and the refusal of appellant to account for the stipulated royalties, alleges that appellee is entitled to a cancellation of the contract, and prays that it "may be canceled and declared null and void," that an accounting may be taken, that appellant be required to pay to appellee such sums as may appear to be due to him, that an injunction be issued, restraining appellant from manufacturing further under appellee's patents, and for other and further relief. To this bill, appellant filed an answer in February, 1910, admitting that more than one hundred cars had been built and sold under ~~the~~ the contract, and alleging that after the first hundred cars had been sold, appellant continued to manufacture, as before, without objection on the part of appellee, who remained in its employ, that it claims the exclusive right to continue such manufacture during the life of appellee's patents, and is willing to pay him \$1,000 per year, irrespective of the number of cars built, as provided by the contract. The answer denies that appellant refused to render statements to appellee, and denies that it has broken the contract, or done anything to forfeit its rights under the same. It avers, however, that appellee is not the sole owner of the patents, but that one James Webster (who at that time was the secretary and treasurer of the appellant company) is a joint owner with appellee of the same, and is entitled to one-half of all amounts due upon the contract. A statement of the sales up to February 1, 1910, is given in the answer, upon ^{which} the amount due

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U.S.A.

for royalties is computed at \$2712. One-half of this sum is credited to appellee and the other half to Webster. From appellee's half is deducted \$202.14 for "cash advanced" and \$250 for a set of blue prints "taken from our drafting room without our permission," leaving an alleged balance due to appellee of \$2440.38 "which sum is tendered." The answer concludes by denying that appellee is entitled to any relief, asserting that the contract is in full force and effect, and claiming that appellant has certain "shop rights" apart from the contract, and that it cannot pay appellee anything until the alleged rights of Webster are determined.

~~A few days after this answer was filed,~~ leave was given to James Webster to become a party defendant to the bill, and he filed an answer (which was afterwards made a cross-bill) setting up a claim to a half interest in the patents issued to appellee, and in all moneys due under the contract. After replications had been filed, the cause was referred, in April, 1910, to a master, who heard a large volume of evidence, and in February, 1912, made a report, in which he found that Webster had no interest whatever in the patents, that the material allegations of appellee's bill had been proved, that the amount due to the complainant at that time was \$4,100.32, and recommended that a decree be entered to that effect.

After most of the evidence had been taken by the master, appellant obtained leave to file, and filed on March 12, 1912, a "re-engrossed and amended" answer. ~~In this answer appellant avers~~ that independent of the contract, it had the right to manufacture automobiles under the so-called "shop right" without compensation ~~to any one;~~ that the patents were developed in its machine shop and factory, and that it contributed to the cost and expense in developing the same. This answer also alleged that the contract does not give the names of all the parties in interest, and asserts that James Webster has equal rights with appellee in the patents

and in all royalties due under the contract; that he was a co-inventor with appellee, contributed his time and money in the development thereof, that the contract was made for his benefit as well as that of appellee, and that Webster claims one-half of the royalties due under the contract; that appellant manufactured 116 cars from the date of the contract to April 30, 1910, of which the first hundred were completed on July 24, 1908; that it paid to appellee all moneys due him for salary as provided by the contract, and had rendered him such statements of account as he had requested; and that on account of Webster's claim, appellant did not know to whom the royalties should be paid. This answer then denies (contrary to its first answer) that appellant is liable for \$1,000 a year after July 24, 1908, irrespective of the number of cars built, and states that prior to that date, the "Duer" automobile was not perfected, and had not the necessary merit and durability to make it "a merchantable car;" that "its mechanical conception" was "inferior, insufficient and impracticable;" that cars built under appellee's patents "wore out, broke down and were returned by customers," that the cost of making repairs upon the cars made the business unprofitable, and that for these reasons, after 116 cars had been completed, appellee was compelled to and did "abandon the attempt to manufacture, because they were impracticable and unprofitable;" that thereupon appellee was notified that no more cars would be made, that appellant would no longer attempt to make any use of the right to manufacture under his patents, except "to keep up the cars already manufactured and dispose of the surplus product;" and that no attempt has since been made to prevent appellee from manufacturing the cars. This answer further avers that on July 22, 1911, a formal written notice was served on appellee, advising him that appellant would waive and relinquish all rights to manufacture cars under said patents, and that no further cars would be made

under the patents or under the contract. The answer then states that at the time of the filing of the first answer, the affairs of the appellant company were under the control of James Webster, and that on account of his personal interest in the matter, counsel for appellant were not properly advised as to its rights; also that after the filing of the first answer, an accounting was had between the parties, and a statement of such account filed with the master: that said account is subject to set-offs claimed by appellant and that appellee is claiming certain amounts in addition to the amounts thus agreed on, which appellant denies his right to receive; that appellant "is ready and willing to have the contract canceled, but avers that said contract has been terminated by its own force and effect, and by the failure of the said Duer to perform his duties in the premises, in not developing a car, and procuring patents for devices which made a practical and profitable automobile." The answer then stated that appellant was willing to deposit with the clerk of the court "the amount of the royalties due on the 112 cars, conditioned that it shall be given a receipt in full of all demands" from both Duer and Webster, and is willing to waive all right under the contract to continue the manufacture of automobiles.

In July, 1913, upon the petition of appellee, an order was entered directing appellant to deposit with the clerk of the court the sum of \$3,124.31, the amount said to have been agreed on at the accounting mentioned in the amended answer, as the amount due from appellant under the contract, and that amount was paid into court by appellant, to be held by the clerk until the further order of the court.

The master's report finds that Webster has no interest whatever in the patents, and recommends that his cross-bill be dismissed for want of equity; that appellee is entitled to one-half the proceeds of the first car built, it having been built under the verbal

contract above mentioned and before the written contract was entered into; that appellee is entitled to \$2787.82 royalties on the sale of the first hundred cars; that during the taking of evidence, it was agreed between the parties that appellee would accept the sum of \$948.40 (instead of \$1,000) in full of royalties upon the manufacture and sale of cars during the year following the completion and sale of the first hundred cars; that appellee is also entitled to \$1,000 for the year beginning July 24, 1910, and ending July 24, 1911, for the reason that although the bill prays for a cancellation of the contract, yet appellant, in its first answer, insisted that the contract had not been broken and claimed the right to continue to manufacture under the contract, and did not give any formal notice that it had ceased manufacturing under it, until July 22, 1911; and that appellee is also entitled to interest at the rate of five per cent. per annum from the dates respectively, that these royalties were due him by the terms of the contract. Thereupon the master made and stated an account, including sundry items not seriously contested, and giving credit for sundry other items, and showing a balance then due to appellee of \$4190.12, and recommended the entry of a decree in favor of appellee for that amount.

Objections were filed to this report by both parties, which objections were overruled. When the report was filed in court, these objections were allowed to stand as exceptions. Upon a hearing before the court, the court sustained appellant's objection to the master's finding and allowance as to the proceeds of the first car built and approved the report as to the remainder of the items. The court further found and decreed that appellant was also liable for \$1,000 a year for each year up to July 24, 1912, (which was about two months prior to the date of the decree) making the total amount due to appellee, \$5,389.12. No objections or exceptions to

the master's report or decree were filed by Webster, and he does not appeal from the decree, nor have any cross-errors been assigned by appellee as to the ruling of the court regarding the proceeds of the first car.

MR. PASQUINIO JUSTICE FITCH delivered the opinion of the court.

It is first urged that it was incumbent upon appellee to allege and prove that the manufacture of automobiles under his patents was practicable and profitable. We think the contention is untenable. The contract provides that nothing therein contained shall bind appellant "to continue in the manufacture of automobiles under the aforementioned patents, should the product be impractical or unprofitable." This provision might furnish a ground of defense, if this were a suit by appellee to recover damages for not continuing the manufacture of such cars; but this suit was brought to recover the agreed royalties upon cars already manufactured and sold, and to cancel the contract because of the failure of appellant to pay such royalties. It was conceded that 135 cars were thus manufactured and sold, and that no royalties were paid thereon. Under such circumstances, whether the further manufacture of such cars was practicable or profitable is wholly immaterial, except to show that appellant was justified in ceasing to manufacture, when it discovered that such manufacturing was impracticable or unprofitable. The burden of proving the latter fact, when it became material to appellant's defense, was on appellant and not on appellee.

We agree with appellant's counsel that the filing of the bill, asking for a cancellation of the contract, constituted an election on the part of appellee to rescind the contract (Graham v. Holloway, 44 Ill. 385; Harding v. Olson, 177 Ill. 278, 304); and if appellant had promptly acquiesced in such election to rescind, by ceasing to exercise any further rights under the contract, and rendering a statement of account to appellee, with a tender of the

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amount due at that time, no doubt the liability of appellant in such case could have been limited to the amount due at the time the bill was filed or the tender made. Appellant did not choose, however, to acquiesce in, or act upon, that theory, but in its answer of February 17, 1910, it denied the right of appellee to rescind the contract, and asserted that the contract was in full force and effect, that it had the right to continue manufacturing, and was in fact continuing to exercise all the rights granted by the contract, and more. It was not until July 22, 1911, that it signified in any binding form, its assent to a cancellation of the contract. We think, therefore, that it cannot now be heard to complain that it was required by the decree to account to appellee according to the terms and conditions of the contract up to that date. Its counsel claims that before that date, appellee was verbally notified that appellant had ceased to manufacture automobiles under appellee's patents, but this evidence is contradicted, and such verbal statements, even if made, could not be given the effect of overriding appellant's sworn answer, asserting the contrary, then on file in this cause. The mere filing of the bill of complaint, even though it prayed for a cancellation of the contract, did not deprive appellee of his right to an accounting for all royalties that accrued by the terms of the contract until the actual cancellation thereof, either by the decree of the court, or by appellant's formal assent to such cancellation.

The items allowed for interest are objected to. We think interest was properly allowed under the statute, as for money due upon a written contract, as well as for money withheld by unreasonable and vexatious delay of payment. (R.U. Chap. 74, Sec. 2.) The contract fixes the percentage to be paid, and fixes the time when the same was due and payable. No reasonable explanation was made for the delay in the payment of such royalties to appellee as they

because due under the terms of the contract. The alleged excuse was that Webster claimed to have a half interest in the patents of appellee, but as this claim was shown to be without any foundation in fact, we think the delay was both unreasonable and vexatious.

It is urged that under the eighth and ninth clauses of the contract, appellant had the right to cease manufacturing automobiles under appellee's patents, and thereby to terminate the contract, at any time that such manufacture should prove to be impracticable or unprofitable. We are inclined to agree with this contention. Considerable evidence was offered upon this theory, and the master found that the evidence did not prove that the manufacture of such cars had become either impracticable or unprofitable. Whether this finding is in accord with the preponderance of the evidence, we need not stop to inquire, for the reason that if it be conceded that the evidence shows that the manufacture of such automobiles had become impracticable or unprofitable, appellant did not attempt to avail itself of its right to terminate the contract for that reason until July 28, 1911, although it actually ceased manufacturing such cars in April, 1910. If, when it stopped manufacturing it had promptly notified appellee that it had elected to terminate the contract because the "product" had proved to be "impractical or unprofitable," the question whether appellant was justified in taking such action, under the facts shown, might be material. Appellant did not take that position, however, at least in any binding form, until July, 1911, and therefore the contract was not, in fact, terminated until that time.

The question of ultra vires is raised by appellant. This question was not mentioned in the trial court until after nearly all the evidence had been taken before the master. In fact it is not clear from the abstract of the record whether any evidence was offered before the master on this question. The master's report makes no allusion whatever to the matter. By an answer filed on

April 10, 1913, appellant avers that the object of the appellant corporation, as specified in its charter, is "the manufacture and sale of carriages, coaches and other vehicles." It is argued that automobiles do not come within the category of carriages or coaches or other like vehicles. An automobile is a motor vehicle, recognized as such by the statutes of this State. The automobile manufactured under appellee's patents was similar to an ordinary buggy. In appearance, it differed from a buggy only by the fact that instead of having wheels in front, it had a small engine covered by a hood. Its purpose was the same as that of a carriage, "or other (like) vehicle." We think there is no merit in the contention, even if it is properly raised upon the record before us.

In one respect, however, we think the decree is erroneous, viz: in allowing to appellee the sum of \$1,000 per year after July, 1911. The only theory upon which such an allowance could be sustained, is that the evidence did not support appellant's claim that the "product" had proved to be "impractical and unprofitable" and therefore the contract remained in full force and effect until canceled by the decree of the court. This theory, however, ignores the fact that the bill prayed for the cancellation of the contract, and that appellant, by its formal notice served in July, 1911, expressly assented to such cancellation, and waived all rights under the contract from that time on. We think the contract was terminated at that time by the acts of the parties, regardless of the question whether the further manufacture of cars was or was not profitable or practicable, and therefore it was error for the court to allow any royalties, or damages equal to the prescribed royalties, accruing by the terms of the contract after that date. The decree, as entered, after allowing to appellee not only substantially all that the master allowed, allows appellee \$2,000 in addition thereto, for royalties accruing after July, 1911, and then provides that the contract "be and the same is hereby canceled." Under the evidence

The first part of the book is devoted to a general survey of the history of the English language, from its origin in the Indo-European family to its present state. The author discusses the influence of various factors, such as contact with other languages, internal changes, and the role of literature and education, in shaping the development of the language. He also touches upon the dialectal variations and the process of standardization.

The second part of the book is a detailed study of the English vocabulary, tracing the origin of words and the process of borrowing from other languages. The author provides a comprehensive list of words and their etymologies, showing how the English lexicon has expanded over time through the influence of Latin, French, and other languages.

The third part of the book is a study of the English grammar, focusing on the inflectional system and the syntax of the language. The author discusses the changes in the inflectional system over time, particularly the loss of case and the development of the auxiliary verbs. He also examines the syntax of the language, including the word order and the use of various grammatical constructions.

The fourth part of the book is a study of the English pronunciation, discussing the changes in the vowel and consonant systems over time. The author provides a detailed account of the historical development of the English phonetic system, showing how the pronunciation of words has changed from Old English to Modern English.

The fifth part of the book is a study of the English literature, discussing the development of the literary language and the role of literature in the history of the language. The author examines the changes in the literary language over time, from the Middle Ages to the present, and discusses the influence of various literary movements and writers on the development of the language.

The book is a valuable contribution to the study of the English language, providing a comprehensive survey of its history and development. It is written in a clear and concise style, making it accessible to a wide range of readers. The author's extensive knowledge of the language and its history is evident throughout the book, and his careful attention to detail is a testament to his scholarly approach.

and pleadings in the case, the decree should have found and adjudged that the contract was terminated in July, 1911.

For the reasons stated, the decree of the Circuit court will be reversed and the cause remanded, with directions to enter a decree in accordance with the report and recommendations of the master, except as to the item of \$250 allowed for one-half the proceeds of the demonstration car, as to which no cross-error has been assigned by appellee.

REVERSED AND REMANDED
WITH DIRECTIONS.

WATSON FIREPROOF WINDOW CO.,
Appellee,

vs.

JAMES A. MILLER and ROBERT B.
MILLER, doing business as JAMES
A. MILLER & BRO.,
Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

1941-316

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

~~This is an appeal from a judgment of the Municipal Court of Chicago in favor of the Watson Fireproof Window Co., plaintiff, against James A. Miller and Robert B. Miller, defendants, for an~~
~~suit brought to recover the amount claimed to be due from the de-~~
~~endants for royalties upon the manufacture of a patented device~~
~~under a license granted to it by the plaintiff, who is the owner~~
~~of the patent. Upon the trial, the defendants admitted that if any~~
~~amount was due, the amount claimed by the plaintiff was correct, but~~
~~denied that the plaintiff was entitled to a judgment in any amount~~
~~whatever, because (1) the plaintiff is a foreign corporation and~~
~~at the time the royalty contract was entered into, had not procured~~
~~a license to do business in Illinois; (2) the terms and conditions~~
~~of the contract were not complied with on the part of the plaintiff.~~
~~These contentions, in substance, are repeated in this court.~~

It appears from the evidence that plaintiff is a New York corporation, that the contract between the parties was signed in Chicago, and that at the time it was signed, the plaintiff had not obtained from the Secretary of State any certificate authorizing it to do business in Illinois. There is no evidence, however, beyond the mere fact that the contract was signed in Chicago, tending to prove that the plaintiff was doing any business in Illinois. ~~It has~~
~~several times been held that the doing of a single act of business~~
~~in this State by a foreign corporation, or the mere bringing of a~~
~~suit in this State by such a corporation, is not a violation of the~~

statute. (Alpena Cement Co. v. Jenkins, etc., Co., 244 Ill. 354; Finch & Co. v. Zenith Furnace Co., 245 Ill. 580; The Journal Co. of Troy v. F. A. L. Motor Co., 181 Ill. App. 570; Watson Fireproof Window Co. v. Ryndon, 182 Ill. App. 134.) The statement is made in the briefs of counsel for appellants that the only business appellees ever did "was the copying of a patent and the issuing of licenses under it." We find no evidence of that fact in the stenographic report of the proceedings at the trial, and the statement is immaterial, even if true.

~~We do so think there is any force in the second contention above mentioned.~~ The contract provided that "this agreement contemplates the vigorous assertion of said Watson patent No. 703784 against infringers to the end that the licensees may be protected and the licensor agrees that it will institute suit and prosecute the same to conclusion. If any adverse decision is handed down by any Circuit Court of Appeals, said licensees shall not be obliged to pay guaranty until such decision is reversed by higher court." It appears from the evidence that a suit was brought against every person, firm or corporation that was infringing the patent except one concern that went into the hands of receivers; that by agreement between the parties to such suits, one of them was made a test case, and that the test case was pending when this suit was brought. There was evidence that the taking of testimony in the test suit had been delayed somewhat, but there is no evidence that such delay was the fault of the plaintiff. ~~On the contrary, the only witness who testified on that subject, said the delay was not caused by the plaintiff.~~

~~The contract provides that no licenses shall be issued to other parties on less favorable terms than to appellants, and it is claimed that this provision of the contract was violated by issuing licenses to four licensees on more favorable terms than to appellants;~~ but there was evidence that this was done with the full knowledge

and consent of appellants. The affidavit of merits set forth the names of many manufacturers in other states who, it was alleged, were manufacturing windows similar to those covered by the plaintiff's patent; but there is no evidence whatever to sustain this averment.

Finding no reversible error in the record, the judgment of the Municipal court will be affirmed.

AFFIRMED.

780a

WATSON FIREPROOF WINDOW CO.,
Defendant in Error,

vs.

JAMES H. PERKINSON and HERMAN E.
GROSS, Co-partners, as PERKINSON &
GROSS,
Plaintiffs in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

194 T. A. 318

MR. JUSTICE SCANLAN delivered the opinion of the court.

This is ~~another~~ ^{that} case which, in all essential features, is identical with the cases of Watson Fireproof Window Co. v. Ayden, 107 Ill. App. 134, and Watson Fireproof Window Co. v. Miller, ^{Case} 108 Ill. App. 20354, of this court. The record, briefs and abstracts in this case are almost identical with those in the latter case, and the decision in this case must be governed by the decision of that case.

For the reasons stated in the opinions heretofore filed in the two cases cited, the judgment of the Municipal court will be affirmed.

~~APPROVED.~~

RIDGEBY

THE RIDGEBY TRADING COMPANY
INCORPORATED IN THE STATE OF NEW YORK
HAS THE HONOR TO ANNOUNCE THAT IT HAS
BEEN ORGANIZED FOR THE PURPOSE OF
DEVELOPING THE NATURAL RESOURCES OF
THE STATE OF NEW YORK AND TO
PROMOTE THE INTERESTS OF THE
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RESOURCES OF THE STATE OF NEW YORK

M. M. THOMAS,
Defendant in Error,

vs.

HARDER'S FIREPROOF STORAGE & VAN
COMPANY,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

194 I.A. 319

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

By this writ of error it is sought to reverse a judgment of the municipal court in favor of Marie M. Thomas, plaintiff, for \$250 for the value of an auto truck stored in the defendant's warehouse. ~~it appears from the evidence that~~ The truck originally belonged to one Theodore E. Jones, and was sold by him to the plaintiff; ~~that~~ Jones afterward married the plaintiff, and they went to Kansas to live; ~~that~~ just prior to their leaving Illinois, in December, 1907, the truck was stored with the defendant, who issued its warehouse receipt for the same, in the name of M. M. Thomas, although the actual delivery of the truck to the defendant was made by Jones; ~~that~~ Jones and his wife were divorced (or the marriage between them annulled) in 1908; ~~that~~ defendant sent monthly statements of the storage charges to M. M. Thomas at Topeka, Kansas, for about a year; ~~that~~ ^{and} during that year, Jones wrote the defendant several letters, requesting, and purporting to authorize, the defendant to sell the truck; ~~that~~ on December 14, 1908, defendant wrote to Jones saying: "we have at last succeeded in closing deal for your automobile truck on the lines previously written you, viz: to net you \$400," and requesting him to "please send in the warehouse receipt which ^{was} outstanding in the name of M. M. Thomas" and a bill of sale "made out to us or the International Automobile Co.;" ~~that~~ ^{and} in answer to this letter, Jones wrote from Denver, Colorado, that the warehouse receipt was at a certain street number in Topeka, Kansas (which was the plaintiff's address, as shown by defendant's bills to her for

storage charges), that ^{now} "this house is closed because of ^{his} absence and because of the absence of W. M. Thomas, who at present ^{now} is in Baltimore, Md., at the bedside of a sick sister," and suggesting that defendant "go on and make the sale just as if the car was ^{his} own property," and promising ^{ed} that on his return to Topeka, "the warehouse receipt ^{will} be mailed to ^{you}," that on January 5, 1909, defendant wrote to Jones that it was "holding check for \$400," which it would forward upon receiving the warehouse receipt for cancellation "as we do not care to deliver said truck without cancellation of this receipt;" ~~that~~ ^{The} warehouse receipt was never delivered by Jones; ~~that~~ ^{during} 1909, and part of 1910, defendant used the truck as its own property; ^{and} that it was finally "burned up" in a fire in defendant's machine shop occurring some time in 1910; ~~that~~ ^{In} November, 1911, defendant paid \$400 to Jones for the truck and received from him a bill of sale, and an affidavit that he was the owner of the truck; ~~that~~ ^{defendant} knew the plaintiff, who had previously stored some of her furniture in its warehouse; ^{and} that in 1912, she presented the warehouse receipt and made a demand upon the defendant for the truck, and when it was not forthcoming, brought this suit to recover its value.

Upon the trial in the Municipal court, the Defendant endeavored to prove that Jones, and not the plaintiff, was the real owner of the truck, notwithstanding the fact that it had issued the warehouse receipt to her. In this court, however, ^{The} defendant ~~took~~ the position that if Jones was not the real owner of the truck, he was at least the agent of the plaintiff, who had actual possession of the truck and the "apparent power of disposition," and that in buying the truck from him, the defendant was in the position of an innocent party who was misled through the fault of the plaintiff. This position is not well taken for two reasons; first, the defendant having issued a warehouse receipt in the name of the

plaintiff, with whom it was well acquainted, and to whom it sent bills for the storage charges, is estopped from asserting that she was not the owner; and second, it did not occupy the position of an innocent purchaser at the time it purchased the tract from Jones, for in its letter of January 5, 1909, it demanded the return of the warehouse receipt before it would pay the price agreed upon. It was then fully advised by Jones' letters, that he did not have the warehouse receipt in his possession, but that it was in the possession of the plaintiff. It was therefore then fully advised that if Jones had any authority to sell, such authority was that of an agent of the plaintiff. For this reason, defendant withheld payment for nearly three years. There was no more reason in November, 1911, to believe that Jones was the owner, than in December, 1909, when it knew that he was assuming to act as the agent of the plaintiff and yet could not produce the warehouse receipt because of her absence. The slightest inquiry, apparently, would have revealed the real facts, and if defendant was misled in any way, it was its own fault.

The only further contention is that the verdict and judgment are against the weight of the evidence. Plaintiff's counsel insist that this question is not open for review in this court, for the reason that the transcript of the record does not contain all the evidence. We think this is true; but we have, nevertheless, examined the evidence in the record with some care, and are not able to say that the verdict is manifestly against the preponderance of the evidence.

The judgment of the municipal court will be affirmed.

AFFIRMED.

ALEXANDER J. THOMSON,
Plaintiff in Error,
vs.
T. SURANOSKI,
Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

194 I.A. 327

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

The plaintiff, Alexander J. Thomson, sued the defendant, T. Suranoski, in the municipal court, upon a promissory note for \$40, signed by the latter, dated March 21, 1911, payable to the order of the South Chicago Business College, fifteen months after the date thereof, which note was indorsed, without recourse, by the business college to the order of J. J. Moser, and by Moser to the order of the plaintiff. The defendant filed an affidavit of verity, setting up that the note was given "for the tuition for the son of said defendant whenever said son attended the South Chicago Business College," and that the consideration for the note wholly failed, for the reason that "the son of the defendant, or any other member of the family, never did attend the said college;" that the college placed the note in the hands of an "adjustment company" for collection, and for that purpose indorsed it to the order of Moser, who was the attorney for the adjustment company; that thereafter, Moser indorsed the note, without any consideration, to the plaintiff, who was an employe of the same company; that each of said indorsees received the note "with notice that the consideration of the said note had failed, and for the purpose of preventing and hindering the defendant from making a defense to said note when sued upon;" and that at the time the defendant signed the note, "he thought he would send his son to the said business college, but thereafter changed his mind."

The record shows that on March 7, 1914, the suit came on for trial in regular course before the court without a jury, in the

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absence of the defendant: ~~that~~ After hearing the evidence offered on behalf of the plaintiff, the court found the issues for the plaintiff, assessed the plaintiff's damages at \$94.45, and entered a judgment for that amount; ~~that On the next day, A~~ motion was filed by the defendant to vacate the judgment; ~~that said motion~~ ~~is continued for hearing on March 12, 1918; that on that day,~~ the court heard the evidence of three witnesses, viz: E. E. Wott, the owner of the business college, J. J. Moser, and the plaintiff. These witnesses were called by the defendant, and testified, in substance, that the note was given for one year's tuition in advance for the defendant's son at the business college, and was procured from the defendant by Moser, who was then a law student and engaged in soliciting students for the college; that after the business college received the note, it was turned over to Moser with other like notes, in settlement of a claim he had against the college for a large amount of accrued commissions; that about a year later, and before the maturity of the note, Moser sold the note for \$90 to the plaintiff, who took it without notice of any defenses on the part of the maker; and that the plaintiff, at that time, was the manager of an "adjustment company," of which Moser thereafter became the attorney. Upon this evidence, the court vacated the judgment and, without hearing any other evidence, entered a finding and judgment in favor of the defendant, from which judgment this writ of error was sued out.

We have searched the record in vain for any evidence tending to support the last finding and judgment of the court. Counsel for defendant in error advances the theory that the trial court did not believe the witnesses: but the note itself was in evidence, and if the court did not believe the evidence of the witnesses, then there is no evidence whatever in the record to dispute the prima facie case made by the introduction of the note. The affidavit of

merits is not evidence in the case; but even if it be assumed, as stated therein, that the plaintiff is not a bona fide holder of the note for value without notice, that fact alone, without any proof of any defense to the note, does not justify a finding for the defendant. There was no denial that the note was executed and delivered. The defendant admits, in his affidavit of merits, that he signed the note, and no witness testified that the note was given without consideration, or that the consideration has failed. It does not appear that the college refused to furnish tuition for defendant's son at any time. It does appear that the son did not attend the business college, but why he did not attend, is explained only by the statement in the affidavit of merits that the defendant "changed his mind." That fact, if true, constitutes no defense to the note.

The judgment of the Municipal court will be reversed and the cause remanded.

REVERSED AND REMANDED.

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THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

LOUIS H. FELDMAN,

Plaintiff in Error.

ERROR TO

CRIMINAL COURT

COOK COUNTY.

194 I.A. 328

MR. FRANCIS JAMES FITZ delivered the opinion of the court.

In August, 1913, an indictment was returned against the defendant, Louis H. Feldman and one Mike Stenzen, charging them with larceny and receiving stolen property. Stenzen pleaded guilty and was released on bail. In September, 1913, the defendant Feldman was tried and found guilty of receiving stolen property valued at seven dollars, but soon after, this verdict was set aside and a new trial granted. In October, 1913, he was tried a second time, and found guilty of receiving stolen property valued at ten dollars. From a judgment entered upon that verdict, this writ of error was sued out.

Upon the second trial, The only witness who testified to facts of any importance, was the alleged accomplice, Mike Stenzen. He testified, in substance, as follows: That he was a tailor and was employed in the "stock room" of a wholesale clothier named Strause; that he knew the defendant, who with his three brothers, kept a dry-goods and clothing store on Twelfth street, near Halsted, in Chicago; that on the last Sunday in June, 1913, he went to Feldman's store with a friend, who was "going to the old country," to buy the latter a suit of clothes; that defendant waited on them; that "during the buying," Stenzen told the defendant that he was a tailor and worked in the stock room "over at Strause's"; that defendant then took him aside and said to him: "Can't you bring me some goods? I could pay you and you could make extra money, besides your wages;" that defendant also said that he could

pay "three dollars for each suit;" that Stenzen "didn't promise to bring him," but went home thinking about it, and on Sunday, July 13, 1913, he stole from the stock room seven yards of blue serge, in two pieces of three and one-half yards each, worth \$3.50 or \$4.00 a yard; that he took these pieces to the store of Feldman brothers, where he met the defendant, who said: "You brought something? Come in;" that defendant took him into the cutting room on the second floor, where they met the defendant's brother, Morris Feldman; that after talking a moment with his brother, the defendant said: "Give me the package," opened it and looked at the goods; that Morris Feldman said: "How much do you want;" that Stenzen replied: "Louis Feldman, he offered me three dollars for each three and a half yard;" that Morris replied: "I won't pay three dollars for three yards and a half, because I know the goods is stolen;" that finally they paid him five dollars for the seven yards, or "\$4.80 for each suit;" that on July 31, 1913, he stole another piece of blue serge of the same size - three and a half yards - worth three dollars a yard, from the cutting room of Strause, and sold it to the defendant for three dollars; that in each of these cases, the defendant paid him by check; that when he and the defendant were arrested, on August 6, 1913, the police officers asked the defendant if he knew Stenzen, and defendant replied that he never saw him before, whereupon Stenzen told the officers to look at defendant's check books, which they did and found the stubs of two checks for three dollars each, payable to Stenzen. The other two witnesses xxxx called by the State merely testified that when defendant was arrested, he at first denied any acquaintance with Stenzen, but when shown the stubs in the check book, admitted (as one witness testified) that he "might have bought goods from him," or (as the other testified) that he "might have paid him these checks." One of these two witnesses was Strause's manager, but neither he nor any one else corroborated Stenzen as to

the alleged theft from Strauss, or as to any other part of Stenzen's story, except as above stated.

~~As appeared in~~ The evidence of these three witnesses -

which constituted the whole case for the prosecution. The defendant called eighteen witnesses, of whom eight testified that defendant had always borne a good reputation. The defendant testified positively that he never saw Stenzen until the day he was arrested; ^{that he never had} ~~he denied having~~ any acquaintance with Stenzen, and denied that Stenzen had ever sold him any goods. The defendant's brother, Morris Feldman, testified that he ^{was} the buyer for the firm of Feldman Brothers; that he bought the goods in question from Stenzen; that Stenzen introduced himself as a jobber, presenting his business card which was offered in evidence, and which reads: "E. Stenzen, Jobber in Suits & Tailors' Trimmings, 211 E. 33rd Street, Chicago;" that Stenzen represented that he had for sale three bolts of cloth, containing 140 or 150 yards in all, of which he had a sample with him, containing a little over three yards; that the cloth was worth \$1.40 to \$1.50 a yard, subject to a discount of "ten per cent, thirty days;" that the defendant, Louis Feldman, was not present at the time; that he (Morris) agreed to buy the cloth at \$1.25 1/2 per yard and Stenzen agreed to deliver the same in two days; that he also bought the sample for three dollars; that a piece of that size is worth less than in the bolt; that he directed the cashier to give Stenzen a check for the three dollars, which was done, whereupon Stenzen asked for the money, and it was given him upon his endorsing the check. The testimony of Morris Feldman as to the business card and the check is fully corroborated by the cashier. ^{The} Evidence of the other witnesses tended to contradict Stenzen's evidence in several minor details.

We have not been favored with any brief or argument on behalf of the People. We have examined the record with care, and

as we understand the evidence, the verdict of guilty and the judgment of conviction rests wholly upon the uncorroborated testimony of Stenzen, who, with an indictment for larceny hanging over him, confesses the alleged theft and accuses the defendant as his accomplice. Under the rule of law existing in this State, a conviction may be sustained upon the unsupported testimony of an accomplice, but it has always been held that such evidence is of doubtful integrity, and is to be received only with the greatest caution. (John v. The People, 197 Ill. 492; Heyt v. The People, 140 Ill. 588.) Having this rule in mind, we feel constrained to hold that the verdict and judgment cannot be permitted to stand. In our opinion, the guilt of the defendant is not only not established beyond a reasonable doubt, but the verdict is clearly contrary to the preponderance of the evidence. There are many circumstances shown by the evidence which tend to discredit the testimony of Stenzen. His story is, in some respects, highly improbable. It is extremely improbable, for example, that any business man of ordinary intelligence, to whom cloth is offered for sale by a clothier's employe, which is known to be stolen from the employer, would pay for the same by check payable to the employe. There is no evidence whatever, aside from the statement of Stenzen, that any of the cloth sold to Feldman Brothers was stolen. No one, except Stenzen, attempts to identify the cloth sold as the property of Strauss, and there is no proof that Strauss claimed to own it. On the other hand, the story told by Morris Feldman, corroborated as it was, in part at least, by the evidence of the cashier, is neither unreasonable nor improbable, and in view of the uncontradicted testimony as to the previous good character of the defendant, we think the court erred in refusing to grant defendant's motion for a new trial.

For the reasons stated, the judgment of the Criminal court will be reversed and the cause remanded.

REVERSED AND REMANDED.

H. WOLD,
Defendant in Error,

vs.

PILSEN FOUNDRY & IRON WORKS,
Plaintiff in Error.

BRANCH TO

MUNICIPAL COURT

OF CHICAGO.

1941 A. 331

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

The plaintiff, H. Wold, recovered a judgment against the Pilsen Foundry & Iron Works, defendant, for damages to the personal property of the plaintiff caused by the collapse of an unfinished building. The suit was originally brought against the owners of the building, the mason contractors, and the defendant company, who had the contract for the iron work. At the close of all the evidence, the court found the owners and the mason contractors not guilty, but found the defendant guilty, and assessed the plaintiff's damages at the sum of \$325.

It appears from the evidence that ~~the building which collapsed was intended to be used for a theatre. It was a single story in height, 72 by 22 feet in dimensions, and the roof was constructed of iron trusses and cement, the trusses resting upon the walls of the building. There was evidence tending to prove that the walls were defectively designed and constructed, were not of sufficient thickness to hold up the roof, and that just before the iron trusses were placed in position, the walls were so much out of plumb that it was necessary to "shore up" the same. The defendant furnished the iron for the trusses, and sublet to another contractor the work of putting them in place. The evidence shows that this work was done as provided by the plans and specifications, and was finished about ten days before the accident. On the day before the accident, however, it was discovered that one of the trusses was bent or "kinked" at the top, and the architect notified~~

the defendant that it must be straightened at once; that the defendant sent two of its own men to the building for that purpose; that the men worked about two hours; that ^{and} they loosened certain of the "tie rods" and tightened others, and put in two new "tie rods" to hold the bent truss in its proper position; that a few minutes after this was done, the whole building collapsed, the north, south and west walls falling outward, and the roof falling to the ground; that a horse belonging to the plaintiff was killed by the falling roof, and some of his personal property destroyed.

The defendant contends that there is no evidence of any negligence on its part; that the finding and judgment are against the weight of the evidence; that the plaintiff was guilty of contributory negligence, and that the damages awarded are excessive. All these contentions, except the first, raise mere questions of fact, and as to such questions, we are of the opinion, after a careful examination of the evidence, that the verdict and judgment are not manifestly against the weight of the evidence. While the evidence on behalf of the plaintiff is not as clear as it might be, it is practically uncontradicted, and this court is not justified in disturbing the finding of the trial court upon pure questions of fact, unless the finding is clearly wrong.

There is much force in the argument of defendant's counsel that the evidence shows that the weakness of the walls, the character of the workmanship, and the general design of the building, were responsible, to some extent, and perhaps to a greater extent than anything done or omitted by the defendant, for the collapse of the building. But it is no defense in an action of this character that persons other than the defendant may have been equally liable with the defendant for negligently causing the injury complained of. The sole question here involved is whether the defendant is so liable. As to that question, several expert witnesses testified that, in their opinion, the collapse of the building was

due not only to defects in the design, in the construction and in the workmanship upon the walls, but also to the fact that just before the accident, one of the trusses was moved by defendant's workmen. One of such witnesses testified that the movement of the bent truss was a "contributing factor" in the collapse of the building. The architect testified that, in his opinion, the cause of the falling of the building was the loosening of the tie rods on the bent truss. In addition to this proof as to the causes of the accident, there was evidence tending to prove that the removal of such tie rods weakened the whole roof structure, and that the act of defendant's workmen in removing the same, under the circumstances shown in this case, was an act of negligence on the part of defendant without which the accident could not have occurred. There ~~is~~ ^{was} some evidence, also, tending to prove that defendant's workmen used a block and tackle in their work, and that the use of such means of straightening the roof truss, under the circumstances in evidence, was an act of negligence proximately contributing to cause the accident. We are, therefore, unable to say, as a matter of law, that there is no evidence of negligence on the part of the defendant.

For the reasons stated, the judgment of the Municipal court will be affirmed.

AFFIRMED.

M. E. Suther
M. E. SUTHER,

Defendant in Error,

vs.

APPEAL TO

MUNICIPAL COURT

UNITED STATES TENT & AWNING CO.,
Plaintiff in Error.

OF CHICAGO.

1941 A. 333

MR. PRESIDING JUSTICE FITZ delivered the opinion of the court.

The plaintiff, M. E. Suther, recovered a judgment against the defendant, United States Tent & Awning Co., in the Municipal court, for the amount claimed by the plaintiff to be ^{him} due for electrical work done and materials furnished to the defendant, partly on a written contract, and partly on oral contracts. The defendant sued out ~~this~~ writ of error, and urged ^{that} the finding and judgment of the trial court should be set aside because they are "manifestly excessive, arbitrary and erroneous." We have carefully examined the evidence in the record, in the light of the very earnest contention of counsel for the defendant, and are of the opinion that the contention is not well founded. Defendant's counsel argue that the evidence of the plaintiff, himself, should be wholly disregarded because it is inconsistent and contradictory. They insist that there is no evidence except that of the plaintiff himself, ^{testified} showing that the work called for by the original contract was ~~not~~ performed. ~~We do not so understand the record.~~ Several other witnesses testified that such work was practically completed to the apparent satisfaction of defendant, when they were ordered by the defendant's officers to quit work on account of threatened labor troubles. ~~It is true that two~~ of the defendant's officers testified that much of the work that was claimed to have been done by the plaintiff, was either not done at all, or had to be done over by another contractor, whom they hired; but there ~~is~~ ^{was} a direct conflict between the witnesses upon that question. The trial court saw the witnesses and heard their testimony, and was in a much better position to judge of their credibility than we are.

Being unable to find anything in the record that would justify us in holding that the finding is clearly and manifestly contrary to the preponderance of the evidence, the judgment of the municipal court will be affirmed.

AFFIDAVIT.



GUSTAV E. BEERLY, Administrator of
the Estate of ANNA ZABELLE GURINIAN,
Deceased,

Defendant in Error,

vs.

GLOBE INDEMNITY COMPANY OF NEW YORK, a
Corporation,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

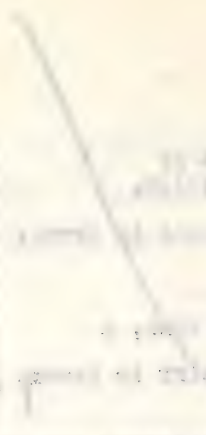
194 I.A. 334

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

By this writ of error it is sought to reverse a judgment for \$875, rendered by the municipal court, in favor of Gustav E. Beerly, administrator of the estate of Anna Zabelle Gurinian, deceased, and against the Globe Indemnity Company of New York.

~~It appears from the evidence that~~ ^{not} the deceased came to her death by being run over by an automobile belonging to one Herman Mollner, ~~that at the time of the accident, Mollner~~ ^{who} carried an insurance policy issued by the Globe Indemnity Company, in which that company agreed to indemnify Mollner "against loss from the liability imposed by law upon the assured for damages as a result of the ownership, maintenance or use" of his automobile, "on account of bodily injuries, including death, at any time resulting therefrom, accidentally suffered or alleged to have been suffered by any person or persons;" ~~that~~ ^{By} other provisions of the policy, the indemnity company agreed to make such investigation of accidents, and to undertake such negotiations or make such settlements "of any claims made," as the company ^{might} deem advisable, and to defend all suits brought against Mollner, "even if groundless," in the name and on behalf of the insured.

~~It also appears that~~ During the year following the accident, negotiations for a settlement of the plaintiff's claim against Mollner were had between the administrator and C. E. Watson, the "superintendent of the western claim department" of the defendant company. The plaintiff testified that on November 17, 1913, as a result of such negotiations, Watson offered, on behalf of the indemnity company, to



SECRET

TO THE SECRETARY OF THE ARMY
FROM THE SECRETARY OF THE ARMY
SUBJECT: [Illegible]
[The following text is mirrored and largely illegible due to the quality of the scan and the diagonal line. It appears to be a memorandum or report.]

pay him \$875 in settlement of his claim, and that he then and there accepted the offer. Watson testified that he never offered the plaintiff more than \$700; that he intimated the company might pay \$875, but that plaintiff demanded \$1000, and that no agreement was reached. No suit against Vollner was brought by the plaintiff, and a few days after the one-year-statute of limitations had run, Watson called the plaintiff by telephone and told him that as no suit had been brought within a year, the company withdrew its offer and declined to pay anything. Thereupon, this suit was brought to recover the amount which the plaintiff claimed the defendant agreed to pay.

The defendant contends, first, that there is no preponderance of the evidence in favor of the plaintiff's theory of the facts; second, that there was no consideration for the alleged offer and acceptance; third, that there is no proof that Watson was ever authorized by the defendant to make such offer, if one was made.

The question as to the preponderance of the evidence in this case depends entirely upon the credibility of the two witnesses, Seerly and Watson, who were the only persons present at the time the alleged offer and acceptance were made. The trial court had these witnesses before it, and was therefore in a much better position than we are, to judge of their credibility. After reading the evidence as it appears in the record, we are unable to say that the finding of the trial court is manifestly against the weight of the evidence.

As to the second point, the defendant claims that the plaintiff must show a liability, or probable liability, against the defendant under the policy of insurance, before he can recover upon any alleged agreement of compromise. Such is not the law. "The compromise of a doubtful right, where there is neither actual nor constructive fraud, and the parties act in good faith, is sufficient

consideration to support a promise." (Adams v. Crown Coal and
Pow Co., 108 Ill. 445; Honeyman, et al. v. Jarvis, 79 Ill. 319.)
In the case last cited, the following quotation from 1 Chitty on
Contracts, 48, was approved by the court: "The real consideration
which each party receives under a compromise, being, not the
sacrifice of the right, but the settlement of the dispute and the
abandonment of the claim, it is no objection to the validity of the
transaction, that the right was really in one of the parties only,
and that the other had no right whatever. The fact that the one
may have had no claim, is immaterial, if he was honestly mistaken
as to his claim." There is nothing in the evidence to show that the
plaintiff was guilty of any actual or constructive fraud in present-
ing his claim, or in conducting the negotiations, nor is there any
evidence of any want of good faith on his part. There was, there-
fore, a sufficient consideration for the promise of the defendant,
even if the plaintiff could not have recovered in a suit against
Wellmer. The fact that defendant admittedly offered \$750 does not
indicate, however, that it believed the claim to be groundless.

As to the third point, it was shown that Watson was in
charge of the claim department of the defendant company in Chicago,
and was clothed with apparent authority to settle any claim covered
by its insurance policies. We think this was sufficient, in the
absence of any countervailing evidence, to bind the defendant.

The judgment of the Municipal court will be affirmed.

APPROVED.

20482
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TERESA SCOLA and BEATRICE SCOLA,
Defendants in Error,

vs.

LUIGI SCOLA,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

194 I.A. 336

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

This writ of error was sued out to reverse a judgment of the Municipal court in an attachment suit brought by the plaintiffs, Teresa and Beatrice Scola, against the defendant, Luigi Scola. The affidavit for attachment stated that the defendant resided in Italy, and that he is indebted to plaintiffs in the sum of \$2000 for money had and received. The attachment writ was served on one Antonio Parisi, as garnishee, and he answered stating that he had in his possession, "subject to the order of the court," the sum of \$1900. Service by publication was had on the defendant, and on December 14, 1913, a judgment was entered against him by default for the sum of \$2,000, and against the garnishee, upon his answer, for the sum of \$1,900, in favor of the defendant for the use of the plaintiffs.

~~The record shows that~~ On the next day after this judgment was entered, the defendant appeared in court by counsel and moved to vacate the judgment; ~~and~~ it was then ordered that the judgment be opened, and that leave be given to the defendant "to make his defence," the judgment to stand as security. At the same time, on defendant's motion, it was ordered "that the plaintiffs file a statement of claim herein" within five days. In response to this rule, the plaintiffs filed a "bill of particulars," stating, in substance, that the "amount claimed by them was for money earned by one of the plaintiffs, Beatrice Scola, and her sister," which money was "handed by plaintiffs to their mother, Teresa Scola, every week or every pay-day for safe-keeping;" that said Teresa

Scola kept it on her person until she became paralyzed, "about two years ago," when it was decided to place the money in a safe deposit vault, of which the defendant, who is the husband of Teresa Scola, "kept the keys;" that said defendant has been unable to work for twelve years, and has been supported by his daughters; that on April 14, 1913, defendant went to the safe deposit box and took the money "which was the property of his daughters," amounting to \$2500, and, without the knowledge of his family, deposited \$1000 thereof with Parisi, with instructions to send it to Italy, forwarded \$300 himself to Italy, and used the remainder to buy his steamship ticket to Italy, and "for exchange into Italian currency;" that after defendant's departure, "plaintiffs learned about his scheme, and notified Mr. Parisi that the money which he had in his possession was their money," and that they would hold him liable for the same.

No plea or affidavit of merits was filed by defendant, but on March 17, 1914, the defendant's counsel filed a written appearance in his behalf.

The common law record shows that on March 18, 1914, the attachment suit came on "in regular course for trial;" that the plaintiffs appeared, but the defendant was "absent and not represented;" that the court heard the evidence and found the issues against the defendant and ordered "that the judgment of December 16, 1913, stand confirmed in full force and effect as the judgment of this court as of the date of the rendition thereof;" that on March 21, 1914, defendant's counsel appeared and moved to vacate the order of March 18, 1914, which motion was overruled, from which order overruling the motion to vacate, the defendant prayed an appeal to the Appellate court, and was given sixty days in which to file a bill of exceptions. The record then shows that on April 11, 1914, a bill of exceptions was filed, consisting of one page, which states that on March 16, 1914, when the case came on for trial, the defendant was present and moved for a continuance for the purpose of taking the defendant's deposition;

that said motion was denied, and that thereupon the court entered a finding and judgment against the defendant, to each of which the defendant duly excepted. The bill of exceptions does not purport to recite any of the evidence, or any of the facts found by the court or appearing in evidence. Later, this writ of error was sued out by the defendant.

The defendant's counsel insist that the court erred in entering the order of March 18, 1914, because "it is apparent from the record" that there was both a misjoinder and non-joinder of parties plaintiff. This contention is based solely upon the statements contained in the plaintiffs' so-called "bill of particulars." It would doubtless be a sufficient answer to the defendant's contention to say that a bill of particulars, not attached to a declaration or statement of claim, but filed afterward, in compliance with a rule entered upon the plaintiffs to file such a bill, is not a pleading, and as it is not set forth, or even mentioned, in the bill of exceptions, it is not a part of the record. (Hess Co. v. Dawson, et al., 148 Ill. 128; Star Brewery v. Farnsworth, 173 Ill. 247.) As it is somewhat uncertain, however, from the incomplete and contradictory record before us, whether the so-called bill of particulars was intended merely as a bill of particulars or as a more specific statement of the plaintiffs' claim, we shall, for the purposes of this opinion, treat it as an amended statement of claim. When so treated and considered, the defendant's contention amounts to this: that the plaintiffs' statement of claim shows, upon its face, that the money taken by the defendant from the safe deposit box was not the plaintiffs' money, but belonged to Beatrice Scobie, one of the plaintiffs, and her unnamed sister, who therefore, were the proper parties to sue and were the only parties who could maintain a suit against the defendant for the recovery of the money so taken by him. If this objection was ever made in the trial court, the record does not show it. No demurrer, or motion to strike, upon this or any other

ground was made at any time. The objection, therefore, comes after judgment. Where such is the fact, the rule is that if the declaration, or statement of claim, contains terms sufficiently general to include, by fair and reasonable intendment, any matter necessary to be proved, and without proof of which no finding or judgment could have been entered, the want of an express averment of such matter in the pleading is cured by the finding and judgment.

(Sargent Co. v. Haublie, 115 Ill. 488.) We think the bill of particulars in this case contains terms sufficiently general to include, by fair and reasonable intendment, an averment that the money taken by the defendant belonged to the plaintiffs at the time this suit was brought. While the bill of particulars states that such money was earned by the defendant's two daughters, and was their property when it was taken by the defendant from the safety deposit box, yet there is also an averment that after defendant departed for Italy, "the plaintiffs notified said Parisi that the money which he had in his possession was their money," that is, the money of the plaintiffs, and that "they" (the plaintiffs) would hold him liable for the same. It is a reasonable inference from this statement that at the time this notice was given to Parisi, which was before this suit was brought, Teresa Eccla, the mother, had become entitled, by assignment or otherwise, to the share previously owned by her unnamed daughter. It was necessary to prove that fact, or something equivalent thereto, in order to entitle the plaintiffs to a judgment in their favor. In the absence of any bill of exceptions containing the evidence heard by the trial court, it will be presumed, on appeal or writ of error, that the evidence was sufficient to sustain the judgment. Hence, under the rule above stated, the want of a more specific statement as to the title of the plaintiffs to the money in question was cured by the finding and judgment in their favor. This being true, no question of misjoinder or non-joinder of parties plaintiff can arise on this record.

For the reasons stated, the judgment of the Municipal court will be affirmed.

AFFIRMED.

DAVID GELIBTER and SAMUEL WOSKOW,
doing business as GELIBTER & WOSKOW,
Defendants in Error,

vs.

FIRST NATIONAL BANK OF CHICAGO,
Plaintiff in Error.

ERRON TO

MUNICIPAL COURT

OF CHICAGO.

194 I.A. 339

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

This writ of error was sued out to reverse a judgment of the Municipal court for the amount of two checks, payable to the order of Gelibter & Woskow, drawn by J. Doppelt & Co. upon the defendant bank, which checks were certified by the bank upon presentation by the payees, but were not paid because the drawer notified the bank not to pay them.

~~It appears from the evidence that in 1903,~~ Jacob Doppelt entered into two contracts for the purchase of real estate from one ^{in trust} ~~Sumner~~; ~~that each of such contracts recited that the purchaser had deposited with Gelibter & Woskow the sum of \$300 as earnest money, to be held by them for the mutual benefit of the parties concerned, and that if the purchaser should fail to perform his part of the contract, such earnest money should be retained by the vendor as liquidated damages; that in fact, however, Doppelt gave the two checks in question to Gelibter & Woskow instead of money; that~~ ~~and~~ they presented the checks to the bank, ~~and~~ the bank certified them, but refused to pay them because payment had been stopped by Doppelt; ~~that Gelibter & Woskow then brought suit against the bank, whereupon Doppelt filed his bill in equity in the Superior court to enjoin the collection of the checks, making the bank, Sumner, Gelibter and Woskow, parties defendant thereto; that a temporary injunction was issued restraining the payees of the checks from further prosecuting their suit; and~~ ^{and} after answers were filed and a hearing had before a master, a decree was entered in accordance with the prayer of the bill, from which decree Gelibter & Woskow prosecuted an appeal

to the Appellate court of this district; ~~that~~ ^{on} October, 1913, The Appellate court reversed and remanded said decree, with directions to dismiss the bill for want of equity (Doppelt v. Deliebter, 178 Ill. App. 384); ~~that~~ The bill was so dismissed, and thereupon this suit was brought; ~~that~~ The Appellate court held that Doppelt, without any sufficient excuse, failed to perform his part of either of said contracts, and for that reason, the earnest money alleged by the contracts to have been deposited with Deliebter & Woskow had become forfeited as liquidated damages.

Upon the trial in the Municipal court, plaintiff in error attempted and offered to prove that the delivery of the checks to Deliebter and Woskow was a conditional delivery only, that there was an understanding or agreement between the plaintiffs and Doppelt that the checks should be held by the plaintiffs, without being ^{that} certified or cashed, in lieu of money, and therefore the act of having them certified by the bank was a fraud. It is urged that the court erred in sustaining objections to this offer. There was no error in the ruling, for the obvious reason that the whole matter was per se admission, and for the further reason that as it is the duty of an account holder to collect the money due upon a check deposited with him as money, and hold the proceeds, instead of the check, it would have been a fraud upon Woskow to carry out any such agreement as the defendant sought to prove, if any was in fact made.

It is also urged that no consideration for the checks was averred or proved. It was not necessary for the plaintiffs to aver or prove such consideration, in the first instance. When the checks were offered in evidence and the signatures proved, a prima facie case for the plaintiffs was made. If the defendant expected to rely upon any want or failure of consideration, the burden devolved upon it to establish such fact by competent evidence. (McNichol v. Barrard, 107 Ill. 640.) Furthermore, the consideration

was in fact shown by the contracts in evidence, and there is no evidence of any kind tending to prove that there was any subsequent failure of consideration.

The judgment of the Municipal court will be affirmed.

APPROVED.

and a number of other things of the same kind, but the
 most important of them is the fact that the
 government has been able to keep the
 country in a state of peace and order.

and a number of other things of the same kind, but the
 most important of them is the fact that the
 government has been able to keep the
 country in a state of peace and order.

JOHN T. BYRNES, as Administrator of
the Estate of DANIEL BYRNES, deceased,
Appellee,

vs.

SOLOMON ZEMOAN,

Appellant.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

Action by
the plaintiff, John T. Byrnes, as administrator of the

estate of Daniel Byrnes, deceased, *against* ~~and the defendant~~, Solomon Zemoan, for attorney's fees alleged to have been earned by the plaintiff's intestate. The defendant filed an affidavit of merits, stating that all the services ~~ever performed by Daniel Byrnes on behalf of the defendant~~ had been paid for during the lifetime of the deceased, and also that the deceased was indebted to the defendant for money loaned. On May 5, 1914, the case was called for trial in the absence of the defendant and a judgment rendered against him for the amount claimed. The next day, the defendant moved to vacate the judgment, and in support of his motion, filed several affidavits, showing that defendant has a meritorious defense to the plaintiff's claim; and also stating, in substance, that before the opening of court on the day of the judgment, the defendant and a man from the office of the defendant's attorney went to the court room and told the clerk of the court that defendant's attorney was actually engaged in the trial of a case in another court of record and would be so engaged all that day, *the* ~~and~~ defendant asked the clerk whether it would be necessary for him to remain, to which the clerk replied in the negative, saying that the case would be passed if reached for trial on that day. The affidavits also show that defendant's attorney was in fact so engaged all that day. ~~After hearing these affidavits, the court denied the motion to vacate,~~ *no denial and the* ~~upon the grounds~~ *defendant* (as stated in the certified statement of the facts) that no diligence was shown by the affidavits, that when the case was called for trial, the plaintiff appeared in court with his witnesses, that no one ap-

peared for the defendant, and "that this court does not recognize any motions or notices made to its clerk."

We think the facts stated in the affidavits were sufficient to entitle the defendant to a trial upon the merits, and that the court erred in denying the motion to vacate. Whether the Municipal court does, or does not, recognize "motions made to its clerk" is, in our view of the matter, wholly immaterial. According to the affidavits, the clerk was merely informed of a fact (viz: that defendant's attorney was actually engaged trying a case elsewhere in a court of record) which, under ordinary circumstances was sufficient, if true, to entitle the defendant, as a matter of course, to have the case passed when reached for trial, and the court clerk took upon himself - as we may judicially know is frequently done - the task of making the motion to the court, but failed to do so, thereby misleading the defendant to his prejudice. There is no denial that such was the fact. Hence, in denying the motion to vacate, the court permitted a judgment to stand which was obtained through no fault of the defendant, but through the fault of its own clerk. Technically, perhaps, defendant had no right to rely upon the clerk's statement, but he did so rely, and that fact being made clearly to appear, without contradiction, accompanied by a prima facie showing of a meritorious defense, we think it was an abuse of the discretion of the court to deny him the opportunity of presenting such defense.

The judgment of the municipal court will be reversed and the cause remanded.

REVERSED AND REMANDED.

1. The first step in the process of identifying a problem is to define the problem. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the underlying causes. Once the causes have been identified, the next step is to develop a plan of action. This involves identifying the steps that need to be taken to solve the problem and determining the resources that will be needed to implement the plan. Once a plan of action has been developed, the next step is to implement the plan. This involves carrying out the steps that have been identified in the plan and monitoring the progress of the implementation. Finally, the last step in the process is to evaluate the results of the implementation. This involves determining whether the problem has been solved and whether the resources have been used effectively.

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S. J. OSTROWSKI,
Plaintiff in Error,
vs.
ANNIE CZARNIK,
Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO

194 T.A. 343

MR. PRESIDING JUDGE FITCH DELIVERED THE OPINION OF THE COURT.

Action by
~~By this writ of error the plaintiff, S. J. Ostrowski, against~~
~~to reverse a judgment of the Municipal court, in favor of~~
~~the defendant, Annie Czarnik, upon the ground that the evidence~~
~~entitles the plaintiff to recover.~~ *And the plaintiff thought*

~~The suit was for real estate commissions.~~ The evidence
shows that while the property in question was listed with the plain-
tiff, ~~the plaintiff~~ *he* was not the exclusive agent, but that other
brokers were also endeavoring to effect a sale: that in February,
1914, the property was sold by the defendant to Mr. and Mrs. Polcyn
jointly, and the defendant testified that this sale was made "from
the outside," meaning through other brokers than the plaintiff;
that in January, 1914, an employe of the plaintiff took Mrs. Polcyn
to see defendant's property, but they did not at that time see the
defendant: that the plaintiff then notified the defendant personally
and by two letters, one in English and the other in Polish, that
the property had been submitted to Mrs. Polcyn. One of the letters
states, however, that the plaintiff only showed Mrs. Polcyn the
"outside" of the property, and that she "refused to step inside."
The plaintiff's employe testified that Mrs. Polcyn told him she had
seen the property before, and the defendant testified that Mrs. Polcyn
had been introduced to her by another real estate man in December,
1913. There ~~was~~ *is* no evidence tending to prove that the visit of Mrs.
Polcyn to defendant's premises, in company with the plaintiff's em-
ploye, either brought about or had anything to do with bringing
about the sale that was finally made. ~~The defendant was called as~~
~~a witness by the plaintiff, and examined under section 23 of the~~

Journal of Management Education 31(1)

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1. *Journal of the American Medical Association*, 1997; 277: 1033-1037.

1. *Chlorophyll a* and *Chlorophyll b* were determined by the method of Arar and Collins (1971) using a Shimadzu 1601 UV-Visible Spectrophotometer.

Municipal Court Act. There is one sentence of her evidence from which it might appear that the plaintiff called Mrs. Polcyn's attention to the property in December, 1913, but the plaintiff, in his testimony, did not claim that such was the fact, but, on the contrary, testified that he first saw Mrs. Polcyn in January, 1914, and that he never saw Mr. Polcyn at any time in connection with the sale. In the absence of any evidence tending to prove that the attention of the purchasers was first called to the property by the plaintiff, or that his efforts had anything to do with the consummation of the sale that was made, we cannot see how the finding of the court could well have been other than for the defendant.

There is another view of the matter which leads to the same conclusion. The plaintiff's statement of claim does not aver a sale to Mr. and Mrs. Polcyn jointly, but avers that defendant "listed" her property with the plaintiff for sale; that plaintiff "introduced to the defendant one John Polcyn, a prospective purchaser, whom plaintiff took to and showed the said premises," and that defendant afterward sold the premises to said John Polcyn. The proof does not show that the plaintiff ever introduced John Polcyn to the defendant at any time, nor is there any proof that Mrs. Polcyn acted at any time as the agent of Mr. Polcyn. "It is still the law in the Municipal court, as in other courts, that a party is limited, in his evidence, to the claim he has made: that he cannot make one claim in his statement and recover upon proof of another without amendment." (Walter . Cabinet Co. v. Russell, 280 Ill. 418.)

The plaintiff contends that the defendant is estopped by her conduct from denying that plaintiff was the procuring cause of the sale. This contention has its sole basis in the fact that the plaintiff's employe told the defendant that if she sold her property to Mr. Polcyn, she would have to pay a commission to the plaintiff, and that defendant replied, "all right." The defendant explained

her answer by saying that she did not know the plaintiff's employe, and did not care to talk to him. However this may be, we do not find any evidence in the record showing that plaintiff did or omitted to do anything thereafter which could give rise to an estoppel of any kind. We think there is no merit in the contention.

The judgment of the municipal court will be affirmed.

AFFIRMED.

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

ALEX SCIGLIANO,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

1941 A. 345

was informed against and convicted
~~was informed against and convicted~~
~~and delivered the opinion of the court.~~

~~Plaintiff in error seeks by this writ of error to reverse~~

~~a judgment entered against him in the Municipal court, finding~~
~~him guilty of a wilful and malicious assault with a deadly weapon~~
~~with intent to inflict a bodily injury upon one Franciaco Vitella.~~

From this consider the defendant presented a motion
it appears from the transcript of the record that the de-
fendant was arrested and taken into court on June 20, 1914, where
an information was filed against him, substantially in the language
of the statute; ~~except for a slight clerical error of no importance.~~

That
thereupon, he signed a written waiver of a jury trial; pleaded not
guilty to the information, and was tried at once and found "guilty."
~~in manner and form as charged in the information.~~ Later, he made
a motion to vacate the judgment on the ground of newly discovered
evidence, but the motion was denied.

~~The transcript of the judgment states that the defendant~~
~~was represented in court by counsel, that before he waived a jury~~
~~he was advised as to his right to a jury trial, and that the court~~
~~heard the testimony "of witnesses" and arguments of counsel before~~
~~he was found guilty and judgment pronounced. There is no bill of~~
~~exceptions covering the proceedings had at the time of the trial,~~
~~and we have therefore no means of knowing what witnesses were heard~~
~~at that time, nor what the evidence was. There such is the state~~
~~of the record, it will be presumed that the evidence heard upon the~~
~~trial fully justified the finding of the trial court. (State v.~~
~~the People, 30 Ill. 22.) There is a bill of exceptions covering~~

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~~the proceedings but at the time the motion to vacate was heard~~
~~and overruled. From this, it appears that in support of the mo-~~
~~tion, defendant filed three affidavits. The first is an affidavit~~
~~of the prosecuting witness, and states that "on account of misunder-~~
~~standing or of ignorance on his part, he failed to state to the~~
~~court certain circumstances which might have had a great weight~~
~~before the court;" that the facts are that he and the defendant~~
~~were old friends; that defendant kept a grocery store, and the wit-~~
~~ness had been one of defendant's customers, but has ceased buying~~
~~from him; that this fact "created some bad feeling," which was so~~
~~aggravated by the gossip of other persons that each came to believe~~
~~the other was "criticising him;" that on June 26, 1914, while the~~
~~witness was passing in front of defendant's store, defendant called~~
~~him and began to ask a question: that the witness "was excited,~~
~~and failed to answer, but placed his hand in his hip-pocket to get~~
~~his pipe and proceed on his way," when the defendant, "acting under~~
~~the impression" that the witness "was getting his pistol," struck~~
~~the witness with a knife, causing a slight wound. The other two~~
~~affidavits~~ *of* ~~by~~ *There were also* ~~by~~ *the* ~~standers who briefly state that they witnessed~~
~~this "hip-pocket" incident. So affidavit was filed by the defend-~~
~~ant or his counsel. There is nothing in the affidavits filed; that~~
~~attempts to explain why this alleged defense was not made at the~~
~~trial, nor why the witnesses were not present at that time. In fact,~~
~~for aught that appears in the record, one, at least, of these wit-~~
~~nesses may have been present at the trial and may have testified to~~
~~the facts stated in the affidavits. There is nothing in the affi-~~
~~davits to show that defendant did not know of this alleged defense~~
~~at the time of his trial, or the names of the witnesses, or that~~
~~either he or his counsel made any effort to get their evidence, or~~
~~made any motion for a continuance. Upon this showing, there was no~~
~~error in overruling the motion to vacate the judgment.~~

Less complaint is made in the brief of defendant's counsel as to the form of the information and the signature to the same, but no error is assigned upon these points. The record does not show that any motion was made to quash the information, or any motion in arrest of judgment. Hence, the question of the sufficiency of the information is not before us.

Counsel finally states that the important point on which he relies for a reversal is that defendant was "charged with a crime, tried and convicted the very same day, and had no opportunity to prepare his defense and to hire an attorney." The record states that he was represented by counsel at the time of the trial; and while it appears that he was accused, arrested, arraigned, tried and convicted all on the same day, there is nothing in the record to show that he did not have a fair trial and the fullest opportunity to present his defense, nor that he was deprived of any substantial right.

The judgment of the Municipal court will be affirmed.

AFFIRMED.

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VICTOR ELECTRIC COMPANY,
a Corporation,
Plaintiff in Error,
vs.
CHARLES MILLER,
Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

1941. 347

MR. JUSTICE PAM delivered the opinion of the court.

Action
This is a suit brought in the Municipal court of Chicago, *by*

by the Victor Electric Company, a corporation, plaintiff in error,

hereinafter referred to as the plaintiff, against Charles Miller,

defendant in error, hereinafter designated as the defendant, for

the sum of ^{to recover} \$99, the price of an electric beer pump which plaintiff ^{sh}

alleged defendant purchased from it under a contract, dated July 2,

1912, and under which contract delivery was made, and for which

defendant refused to pay. On the trial of the case before the

court without a jury, judgment was rendered in favor of the defend-

ant and against the plaintiff for costs; to reverse which plain-

tiff has sued out ^{to} this writ of error.

Plaintiff's statement of claim sets forth the contract in ^{Serial on}
full, which is as follows:

"July 3d, 1912.

"Victor Electric Co.,
Chicago, Ill.

Gentlemen:

"Please send me, via Chicago, Ill., the
following:

"One Automatic Electric Beer Pump for
which I agree to pay you the sum of ninety dollars
on or before Sept. 2nd, 1912 from time current is in.

"It is further agreed that the title to the
above described goods shall remain in Victor Electric
Company until purchase price has been fully paid as
agreed, and in case of default in payment for thirty
days, vendor shall have the right to repossess itself
of said goods.

CHARLES MILLER,
5800 Ashland Ave."

The statement of claim further alleges that said pump

has been delivered and that defendant refused to pay. The affi-

davit of merits filed by defendant set forth that plaintiff agreed

to deliver and completely install ^{the} said beer pump on or before July 3, 1912, but that ^{he} plaintiff made no effort to install ^{the} said pump until August 15 thereafter; and furthermore, that on July 15, defendant notified plaintiff that because of its failure to install the pump, ^{he} defendant had no use for it and requested its removal; ~~that the failure to install was a breach of the contract, because of which defendant was not in any wise indebted to the plaintiff.~~

~~On the trial of the case plaintiff placed in evidence the contract, and further introduced testimony to show that the pump was delivered on July 3, upon which date defendant signed a memorandum acknowledging receipt of the pump in good order, and making payment of \$10 thereon; that at the time the pump was sold there was no wiring in the premises of defendant to which to connect the pump; that a few days after the delivery of the pump, defendant called up about connecting the pump and was asked whether the wiring to carry the current had been inspected, to which defendant replied in the negative, whereupon he was told by plaintiff that inspection was necessary, to which defendant replied "All right," that he would inform plaintiff when the inspector had passed upon the work; that prior to the time of this conversation plaintiff had called up the Commonwealth Edison Company to see whether or not any service had been given the defendant; that it had never been notified that the defendant's place had been wired for current or that an inspection had been made.~~

The only witness for the defense was the defendant. ~~He did not deny the execution of the aforesaid contract, but stated that after the contract was signed, plaintiff's representative promised that he would attend to everything and have the pump in running order within a week at the longest; that he talked with the representative of the plaintiff two weeks afterwards and was told that an inspection would have to be made before the pump could~~

be set up; that the last conversation he had with any representative of plaintiff took place on the first of August; that while the Commonwealth Edison Company was to put the current into the building, plaintiff was to attend to having it done; that about August 10 defendant purchased a pump from another company and that he thereafter signed a contract with the Commonwealth Edison Company for the installation of electric current.

Upon this state of the record, defendant contends that plaintiff was charged with the duty of seeing that the current was put in, and the failure to do so constituted a breach of the contract which relieved him of the covenants therein contained. The judgment shows that he was sustained in this view of the case by the court.

In permitting evidence as to the conversations between the defendant and the representative of the plaintiff after the contract had been entered into, the court was evidently of the opinion that the terms of said contract were ambiguous. If the contract was ambiguous and the conversation helped to explain such ambiguity, the court's ruling was proper. But as we view this contract, it contained no ambiguity whatever. Judging from the nature of the evidence admitted, the language which the court thought not clear was, "from time current is in." As we read this contract, however, it means nothing more or less than that the defendant purchased from plaintiff one electric beer pump, for which he agreed to pay the plaintiff \$900 on September 2, 1912, or before September 2, 1912, should the current be placed in the premises before that time; that is, if the premises were wired and current furnished and the pump installed prior to September 2, payment should be made prior to that date. In any event, it was to be paid for by September 2. There was no obligation in the contract for plaintiff to see that this place was wired and inspected. While said contract may have carried with it the duty to connect the pump, yet it could not be

connected until the premises were wired and equipped with electricity. Plaintiff even facilitated that by requesting the Commonwealth Edison people to see defendant with a view to having him secure service for electricity. He was told that as soon as the wiring was in and inspected and current furnished, the pump would be connected. Defendant does not deny this, but insists that the plaintiff agreed to see that the wiring was done. While this is denied in the evidence by the plaintiff, yet the evidence of the defendant on that point was incompetent because there was nothing in the contract which provided for the plaintiff's doing so. The contract was complete in itself. Such evidence tended to vary a written contract, for which there was no consideration and should not have been considered by the court in arriving at a conclusion as to the issues in controversy. Defendant himself stated that he did not communicate with plaintiff after August 1st. On August 10th he bought a new pump, upon which he had to make no deposit, and on the same day arranged for current from the Commonwealth Edison people. The evidence shows that plaintiff had complied with its contract and stood ready to connect the pump as soon as defendant had prepared the premises with electricity so the pump could be connected. We are of the opinion that the contract was clear and explicit and not ambiguous, and that the court erred in admitting the testimony of defendant with reference to any conversation had with the representative of plaintiff, as to a promise to see that electricity was furnished. In our opinion, the finding of the court is clearly and manifestly against the weight of the evidence and the judgment based thereon must therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

[illegible]

NATALIE STACEY and JOHN JAMES STACEY, a minor, who sues by Natalie Stacey, his mother and next friend,
Plaintiffs in Error,

vs.

MAX ROBBIN, ALBERT B. JOYNER, WILLIAM SULLIVAN, WALTER G. MUELLER and JACOB FRANK,
Defendants in Error.

ERROR TO

CIRCUIT COURT

COOK COUNTY.

1941 A. 349

STATEMENT OF THE CASE.

An action was brought by

This is a suit of Natalie Stacey and John James Stacey, a minor, by his mother and next friend, Natalie Stacey, against Max Robbin, Albert B. Joyner, William Sullivan, Walter G. Mueller and Jacob Frank, under section 2 of an act relating to Dram Shops, which is as follows:

"Every husband, wife, child, parent, guardian, employer or other person, who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person or persons; and any person owning, renting, leasing or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, or who having leased the same for other purposes, shall knowingly permit therein the sale of any intoxicating liquors that have caused, in whole or in part, the intoxication of any person, shall be liable, severally or jointly, with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained, and for exemplary damages: and a married woman shall have the same right to bring suits and to control the same and the amount recovered, as a feme sole; and all damages recovered by a minor under this act shall be paid either to such minor, or to his or her parent, guardian or next friend, as the court shall direct; and the unlawful sale, or giving away, of intoxicating liquors, shall work a forfeiture of all rights of the lessee or tenant, under any lease or contract of rent upon the premises where such unlawful sale or giving away shall take place; and all suits for damages under this act may be by any appropriate action in any of the courts of this state having competent jurisdiction."

To the declaration filed in said suit on behalf of the plaintiffs, a general demurrer was filed by William Sullivan, and general and special demurrers were filed by Walter G. Mueller, Jacob Frank and Max Robbin. Defendant Joyner filed a plea of general issue and notice

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

of the special defense that he was not the owner or in control of the premises mentioned in the declaration or in possession or control of the premises in which defendants or either of them conducted a dram-shop.

On March 19, 1913, the court entered an order finding plaintiff's declaration stated no cause of action, and upon motion of the plaintiffs, leave was granted to file an amended declaration instantler, and it was further ordered that the demurrers to the original declaration stand as demurrers to the amended declaration; and the cause coming on to be heard on the same day, on the amended declaration and demurrers of the several defendants thereto, the court found that the said amended declaration stated no cause of action, and it was ordered that said demurrers and each of them to plaintiffs' said amended declaration be sustained, and judgment was entered in favor of the demurring defendants and against the plaintiffs for costs; to reverse said judgment plaintiffs have sued out this writ of error.

MR. JUSTICE PAN delivered the opinion of the court.

The amended declaration states that:

"On to wit: December 2, 1911, in Cook County, Illinois, defendant Max Robbin conducted a dram-shop in a building owned by defendant Albert B. Joyner, who knowingly permitted a dramshop to be conducted in said property: that the defendant William Sullivan conducted a dramshop on said date in Cook county, Illinois; that the defendant Walter G. Mueller on said date in Cook county, Illinois, conducted a dramshop in property owned by the defendant Jacob Franks, who knowingly permitted said dramshop to be conducted: That the plaintiffs are the wife and minor son of John James Stacey and that prior to the date above mentioned he supported and maintained them. That on the date mentioned the defendants, Max Robbin, William Sullivan and Walter G. Mueller, did sell and give intoxicating liquors to the said John James Stacey, which liquors in whole or in part caused him to be and become intoxicated and in consequence of such intoxication said John James Stacey did on said date then and there kill and murder one Mattie Kaufman and that in consequence of the ^{commission} ~~mission~~ of said crime said John James Stacey was indicted by the grand jury of Cook County, Illinois, and upon such indictment was tried, convicted and sentenced to the penitentiary for and during the period of twenty-five years and is now serving said term of imprisonment, and that by reason of the premises the plaintiffs have sustained damages in the sum of thirty thousand dollars and that by virtue of the statute a cause of action has accrued to them to have and demand of the defendants said damages."

1. At the present time, the only method of determining the sex of a bird is by the shape of the bill. The male has a longer, more pointed bill than the female. This is true of all birds, but the difference is more pronounced in some species than in others. In some species, the male has a longer, more pointed bill than the female. This is true of all birds, but the difference is more pronounced in some species than in others.

The demurring defendants contend: (1) Not only does the amended declaration fail to show that the intoxication alleged therein was the proximate cause of the injury, but that said declaration on its face indicates that the intoxication alleged was not the proximate cause of the injury; (2) Said declaration fails to show a cause of action against any of the defendants because ^{of} want of an allegation that plaintiffs have been injured in their person, property or means of support; and (3) That no cause of action is stated against the defendants Frank and Joyner, in that the declaration fails to set forth that the other defendants named sold or gave such intoxicating liquors in the property or building owned by defendant Frank, or in the property or building owned by defendant Joyner. We shall discuss these points ad seriatim.

The amended declaration shows that plaintiffs are the wife and minor son of John J. Stacey and that prior to the date above mentioned he supported and maintained them; that on the date mentioned the defendants did sell and give intoxicating liquors to the said John J. Stacey, which liquors in whole or in part caused him to be and become intoxicated and in consequence of such intoxication said John J. Stacey did on said date then and there commit a crime and that in consequence of the commission of said crime the said Stacey was indicted by the grand jury of Cook county, Illinois, and upon such indictment was tried, convicted and sentenced to the penitentiary for and during the period of twenty-five years and is now serving said term of imprisonment, and that by reason of the premises the plaintiffs have sustained damages.

This, in our opinion, sufficiently shows that the intoxication charged therein was the proximate cause of such injuries. But as we read the declaration, plaintiffs do not allege, as is required by section 9, wherein plaintiffs have been injured, - whether in their person, property or means of support; which brings us to the second contention of the defendants.

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Section 9 previously quoted states that "every husband, wife, child, parent, guardian, employer or other person, who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication, in whole or in part." (*Italics ours.*)

There is no question that the entire Dram Shop act, including section 9, is penal in character and must be strictly construed, and that to maintain an action thereunder plaintiffs must bring themselves clearly within its terms. Schulte v. Schlesper, et al., 210 Ill. 367; McLees v. Miles, 93 Ill. App. 442.

In the declaration which has already been set out in full, the only language which can in any way refer to any injuries sustained by plaintiffs to their persons, property or means of support, is the following:

"That the plaintiffs are the wife and minor son of John James Stacey and that prior to the date above mentioned he supported and maintained them."

The remainder of the declaration refers merely to the facts upon which plaintiffs depend to show that defendants caused the said Stacey to become intoxicated, and that said intoxication was the cause of his committing the crime for which he was convicted and imprisoned; and the declaration concludes as follows:

"And that by reason of the premises the plaintiffs have sustained damages in the sum of thirty thousand dollars and that by virtue of the statute a cause of action has accrued to them to have and demand of the defendants said damages."

This language is merely a statement of the damnum. ~~This language merely states the~~ ad damnum ~~plaintiffs claim to have~~ suffered; but wherein they were injured nowhere appears in this declaration.

In cases brought under this statute it has been held improper to introduce evidence of an injury sustained to the person of the plaintiff where the declaration set forth only that plaintiff

sustained injuries to his or her means of support. This has been held in Hackett, et al. v. Smelsley, 77 Ill. 109, where, in addition to evidence tending to show injury to plaintiff's means of support, there was also evidence introduced tending to show injuries to the person. The following language is applicable to the case at bar (p. 113):

"The statute gives the right of action for three separate descriptions of injury - injury in person, or property, or means of support.

"As the declaration in this case counted only upon an injury in means of support, the evidence should have been confined to such injury, and it was error to admit this evidence of personal injury and ill-treatment."

This case was cited in McLees v. Hiles, supra, wherein the trial court also admitted testimony tending to show injuries to the person of ^{the} plaintiffs, and it was there held that such testimony was improper; the court saying (p.444):

"The Supreme Court of this State has in many cases held that the statute under which this suit is brought must be strictly construed and the evidence limited to the issue in the case. There was no charge in the declaration of injury to the person in any manner, the only charge being that of injury to and loss of support."

To the same effect are Flynn v. Fogarty, 106 Ill. 323, and Hanewacker v. Porman, 152 Ill. 321.

In the case at bar, by reason of the absence of any charge in the declaration of injury to either the person, property or means of support, there was no issue presented for trial, consequently the declaration did not state a cause of action. This brings us to the third contention of defendants.

While the declaration stated that Jacob Franks knowingly permitted Walter G. Mueller to conduct a dram-shop in the property owned by him, and that Albert G. Joyner knowingly permitted a dram-shop to be conducted by defendant Max Robbins in a building owned by him, yet nowhere is it alleged therein that said defendants sold or gave intoxicating liquors to the said Stacey in the property or building owned by defendants Frank or Joyner, or either of them; and in

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The population of the United States has increased from about 100 million in 1900 to over 200 million in 1960. At the same time, the population of rural areas has decreased from about 100 million in 1900 to about 50 million in 1960. This has led to a concentration of the population in urban areas, which has had a number of important consequences for the development of the United States.

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the absence of an averment to that effect, the declaration showed no cause of action against the defendants Frank and Joyner. We are therefore of the opinion that the Circuit court was correct in arriving at its conclusion that the amended declaration stated no cause of action against the demurring defendants. The judgment must, therefore, be affirmed.

AFFIRMED.

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CESAR CHAS.

Defendant in Error,

ERROR TO

vs.

MUNICIPAL COURT

FRANK E. BODGE and FRANK FOSTER,
Plaintiffs in Error.

OF CHICAGO.

194 I.A. 352

STATEMENT OF THE CASE. ~~This is a suit brought~~ in the Municipal court of Chicago, by ~~Cesar Chas.~~, defendant in error and hereinafter referred to as the plaintiff, against Frank E. Bodge and Frank Foster, plaintiffs in error and hereinafter designated as the defendants, to recover damages sustained for the wrongful suing out of a writ of attachment against the plaintiff by defendant Bodge. On ^{the} trial ~~before~~ before the court without a jury, ^{from 9 miles for} ~~there was a finding in favor of the plaintiff for \$20.41~~ ^{for the plaintiff} upon which ~~finding~~ ^a judgment was entered; to reverse which defendant has sued out this writ of error.

~~Mr. JUSTICE RAY delivered the opinion of the court.~~

^{7th} On July 22, 1913, defendant Bodge brought an attachment suit in the Municipal court of Chicago against the plaintiff, to recover moneys due upon a board bill. The attachment bond was signed by Frank Foster, the other defendant, as surety. In the attachment suit the Elgin, Joliet & Eastern Railway Company was served as garnishee, and as a result of said garnishment, the railway company refused to pay plaintiff the wages due him. The plaintiff ~~thereupon~~ consulted Mr. A. H. Epstein, an attorney. The evidence ^{further} shows that Mr. Epstein spent several hours in consultation with plaintiff regarding the attachment suit; that the attachment suit was transferred from the second to the first district; that on August 10, 1913, plaintiff's attorney entered his appearance in the attachment suit and asked that the case be set for immediate hearing; that an affidavit of writs was prepared and filed; that upon the trial of the case before ~~Judge~~ ^{the} trial judge.

12-11-1952



The following is a summary of the results of the experiments conducted on the effect of the concentration of the solution on the rate of reaction. The results are shown in the table below.

Concentration of Solution (M)	Rate of Reaction (1/min)
0.1	0.05
0.2	0.10
0.3	0.15
0.4	0.20
0.5	0.25

It is evident from the table that the rate of reaction increases as the concentration of the solution increases. This is due to the fact that a higher concentration of the solution means that there are more molecules of the reactants present, which increases the probability of a collision between them.

The following is a summary of the results of the experiments conducted on the effect of the temperature on the rate of reaction. The results are shown in the table below.

Temperature (°C)	Rate of Reaction (1/min)
20	0.05
30	0.10
40	0.15
50	0.20
60	0.25

It is evident from the table that the rate of reaction increases as the temperature increases. This is due to the fact that a higher temperature means that the molecules of the reactants have more kinetic energy, which increases the probability of a collision between them.

The following is a summary of the results of the experiments conducted on the effect of the catalyst on the rate of reaction. The results are shown in the table below.

Catalyst (M)	Rate of Reaction (1/min)
0.1	0.05
0.2	0.10
0.3	0.15
0.4	0.20
0.5	0.25

It is evident from the table that the rate of reaction increases as the concentration of the catalyst increases. This is due to the fact that a higher concentration of the catalyst means that there are more molecules of the catalyst present, which increases the probability of a collision between them.

on August 20th, counsel for plaintiff asked that the attachment issue be tried first, and independently of the assumpsit issue; ^{which} ~~but~~ the court denied ~~such motion~~ and ordered the trial to proceed as to both issues: that after plaintiff was put on the stand in the attachment suit under section 83 of the Municipal Court Act, his attorney moved to quash the attachment.)

~~The record also shows~~ that the attorney for defendant Sedge also moved to quash the attachment, and that the court granted the motion. The court then proceeded to try the assumpsit issue. Sedge took the stand and testified on the assumpsit issue. His testimony was objected to because it was at variance with the statement of claim. The court was of a similar opinion, and thereupon leave was granted to file an amended statement of claim, and the cause was continued. The evidence further shows that \$25 was a reasonable charge for the services rendered by Mr. Eppstein in the attachment suit. The item of 45¢ was for expenses in and about securing a transfer of the case from the second to the first district. Upon this evidence the judgment for \$25.42 herein complained of was entered.

Defendant contends that the evidence shows that the amount paid covered all services rendered in the suit, inclusive of both the attachment and the assumpsit issues, and that in this suit there could be no recovery except for services rendered in and about the disposition of the attachment issue. As we read the record in this case, we find that all the services rendered by Mr. Eppstein were necessary in and about the disposition of the attachment issue. Plaintiff requested the court to try the attachment issue separately ~~from the assumpsit issue~~, but the court ~~denied that request~~ ^{does not appear} ~~record shows that no disposition was made of the assumpsit issue,~~ save that leave was given to file an amended statement of claim, and the cause continued. ~~For the value of those services in the at-~~

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tachment said plaintiff was liable, and the court was warranted in allowing him to recover therefor.

Finding no reversible error, the judgment will be affirmed.

AFFIRMED.

J. H. DOHERTY,
Defendant in Error,

vs.

GRAND TRUNK WESTERN RAILWAY
COMPANY,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

1941A.354

STATEMENT OF THE CASE. Defendant in error (plaintiff below) recovered judgment against plaintiff in error (defendant below) for \$107.25 and costs, the value of a suit case and its contents, checked as baggage by the Pere Marquette Railway Company from Helling, Michigan, to Saranac, Michigan, via Pere Marquette Railway Company to Ionia, Michigan, and then via Grand Trunk to Saranac. Suit was originally started against both the Pere Marquette Railway Company and the defendant, but before judgment, suit was dismissed as to the Pere Marquette.

MR. JUSTICE PAM delivered the opinion of the court.

The facts in the case are few. There was but one witness, - the plaintiff himself. He testified that he was a traveling man for the Canfield Manufacturing Company, which carried on what is known as a "punch board proposition." While no explanation is made as to what it was, yet Plaintiff testified that it was his duty to place goods on consignment and go around and collect afterwards; that in connection with such duties he carried with him watches, diamonds, etc., which were given away by him as premiums on the collections; that on October 18, 1912, while at Helling, Michigan, on business, he purchased a ticket of the Pere Marquette Railroad for Saranac, Michigan; that the Pere Marquette Railroad runs on to Ionia, where connection is made with the Grand Trunk for Saranac; that the ticket, however, was for a continuous passage; that on said ticket, he checked his suit case to Saranac, and paid the Baggage man of the Pere Marquette Railroad ten cents to cover transfer

at Ionia from the Pere Marquette to the Grand Trunk railways. Plaintiff testified that he saw his suit case at Ionia on one of the trucks of the Grand Trunk, at the time he changed cars there; that when he arrived at Saranac, he went up town to attend to his business, and on the same evening left Saranac, without taking his ~~suit case~~ ^{getting his suit case.} ~~In fact, he says he forget all about it.~~ He left Saranac that same evening for Lowell. The next day, while at Lowell, he ~~said~~ wrote to the baggage master at Saranac with reference to his suit case. He further testified that the value of the suit case and contents was \$107.25. Among the items making up the total, were eight watches valued at \$4 each, one diamond ring valued at \$4.50, and one diamond stud valued at \$4.50, which plaintiff further testified were the property of the Canfield Manufacturing Company, and were carried by him for the purpose of distribution as premiums upon collections made by him.)

On this state of the record, defendant contends: (1)

There is no evidence of a delivery of plaintiff's suit case by the Pere Marquette to the Grand Trunk and an acceptance thereof by the Grand Trunk; (2) Plaintiff was not entitled to recover without a presentation of his baggage check or at least a demand for his baggage at Saranac, Michigan, and a refusal by defendant to comply with his demand; and (3) The court erred in rendering judgment for the value of the articles of merchandise belonging to plaintiff's employer and which plaintiff checked as his baggage.

Defendant's first contention is not well taken. Delivery was made to the Pere Marquette who ^{it} sold a ticket through to Saranac, via the Grand Trunk from Ionia. The Pere Marquette, in the sale of this ticket for continuous passage, and in accepting the baggage to be shipped through to Saranac via the Grand Trunk, was acting both as principal, and as the agent of the Grand Trunk. The plaintiff saw this suit case on a truck of the Grand Trunk. We believe, therefore,

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under the evidence, that the court was warranted in finding that there had been a suit case delivered to the Grand Trunk.

We cannot concur in the proposition, as an absolute principle of law, that before plaintiff is entitled to recover, there must be proof of a presentation of his baggage check, because there are many authorities that hold that under certain circumstances the failure to present the baggage check is not fatal to a recovery. We do, however, agree with defendant in the contention that plaintiff at least was compelled to make a demand for his baggage at destination.

It is the law in this state that a railroad company is an insurer of the baggage of a passenger so long as the relation of a common carrier exists, and that exists as to such baggage until its arrival and discharge at the place of destination and until the owner has had reasonable time and opportunity to claim and take it away. In C. & A. R.R. Co. v. Addizcat, 17 Ill. App. 638, the court say (p. 638):

"We understand the rule of law to be that the reasonable time within which the owner must apply for his baggage, when it is transported by the same train on which he himself travels, is directly after its arrival and transfer to the platform, making due allowance for the confusion occasioned by the arrival and departure of the train, and for the delay necessarily caused by the crowd on the platform." (Citing cases.)

It was plaintiff's duty to claim his baggage immediately upon arrival in Saranac, or as soon thereafter as possible. In this he failed entirely. He attended to his business in Saranac, leaving there the same evening, and made no effort to secure his baggage until 24 hours later, when he claims to have written the baggage master at Saranac about it. That this alleged communication contained, - whether it demanded the suit case, or gave shipping directions - does not appear.

After its duty as a common carrier had ceased, defendant, with respect to this baggage, became a warehouseman, in which latter capacity, its only duty was to hold the suit case until called for.

In order to constitute a conversion, there must be a demand made for the goods. Plaintiff, in the course of his brief, refers to certain letters introduced in evidence, but these letters neither expressly nor impliedly show that any demand was made. It was not incumbent upon defendant to follow the plaintiff wherever he might be, and deliver it. As we view the record, it is absolutely barren of any evidence of a proper demand, and without such demand defendant is not liable; the defendant cannot be charged with a refusal to comply with a demand that the evidence fails to show was made.

Defendant further contends that it was error for the court to include in its judgment the value of the watches and diamonds which plaintiff testified were in the suit case. The evidence shows that these articles of merchandise belonged to plaintiff's employer. In Michigan Central R.R. Co. v. Carrow, 73 Ill. 340, it is held that (p.350):

"A traveler who presents to a carrier of passengers a trunk or valise, such as is commonly used for the transportation of wearing apparel, represents, by implication, that it contains only such articles as are necessary for his comfort and convenience on the journey, and if, in fact, it contains merchandise, the traveler is guilty of such fraud as to absolve the carrier from the extraordinary liability of an insurer."

There is no question that these watches and diamonds were not a part of plaintiff's personal belongings; on the contrary they were articles of merchandise belonging to the plaintiff's employer and which the plaintiff had in his possession for the purpose of delivery to customers of the employer. Clearly, therefore, the court erred in including these items in its judgment. If this were the only error committed, this court might affirm the judgment upon the plaintiff's remitting the value of these articles, but in view of our opinion that the evidence fails to show a proper demand, the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

E. J. BENJAMIN,
Defendant in Error,

vs.

D. D. D. COMPANY, a corporation,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO
194 I.A. 357

STATEMENT OF THE CASE. This is a suit brought in the Municipal court of Chicago by E. J. Benjamin, defendant in error, hereinafter referred to as the plaintiff, against the D. D. D. Company, a corporation, plaintiff in error and hereinafter designated as the defendant, for damages sustained by the plaintiff by reason of a breach of contract of employment entered into between plaintiff and defendant. On the trial below before the court without a jury, judgment was entered for the plaintiff for \$400.00, to reverse which defendant has sued out this writ of error.

MR. JUSTICE PAX delivered the opinion of the court.

The D. D. D. Company, defendant herein, was a corporation that had been for many years engaged in the manufacture and sale of patent medicines. Plaintiff had been a salesman and working for different corporations and concerns engaged in a similar business. Plaintiff's statement of claim sets forth that on or about November 4th defendant had employed plaintiff for a period of six (6) months as traveling salesman, beginning the early part of January, at a salary of \$250 per month and railroad expenses, which employment plaintiff accepted; that on or about November 25th defendant mailed plaintiff a notice that it would cancel the contract, which notice was not received, however, until about December 7, 1912; that plaintiff was ready and willing to perform his part and offered to do so but defendant persisted in its refusal to carry out the contract, and thereafter plaintiff sought other

employment; that he did thereafter secure employment but at a rate of compensation less remunerative than provided in said contract; because of said breach of contract plaintiff was injured in the sum of \$400.85.

To the said statement of claim defendant filed an affidavit of merits wherein it was not denied that defendant employed said plaintiff, but wherein it was claimed that said employment was induced by representations that plaintiff was a person of good and steady habits; that plaintiff assured defendant that his former employers would substantiate that representation, and that it was because of this assurance that it agreed to employ said plaintiff; that said agreement was subject, however, to cancellation in the event the references furnished by plaintiff would not bear out his representations; that the references furnished by the plaintiff were not of the character as represented, but to the contrary, and that therefore defendant was justified in canceling said contract; that said cancellation was in apt time, and therefore defendant was not in anywise indebted to plaintiff.

The evidence shows that on or about October 30th plaintiff placed himself in telephonic communication with E. E. Page, representing defendant, with reference to securing employment with defendant company, and that on that same day he visited the place of business of the defendant; that he first had a talk with Mr. Page and was then referred to his assistant, a Miss Smith (now Mrs. Tomhagen); that on the same day defendant addressed the following letter to plaintiff:

"Chicago, Oct. 30, 1912.

"Mr. E. J. Benjamin,
Metropolis, Ill.

Dear Sir:

"In reference to your visit with us this morning and the talk we had about sales work on D.D.D., would say that the first of January, 1913, we will be ready to send a salesman out on a six months' trip and would like to give you the opportunity to take that trip. Will you

A. The first fundamental principle of the Government is that of the separation of powers. The executive, legislative, and judicial powers are vested in three distinct branches of the Government, each of which is independent of the others and checks and balances the others. The executive power is vested in the President, the legislative power in the Congress, and the judicial power in the Supreme Court.

The second fundamental principle is that of the protection of individual liberties. The Government is established to secure the rights of the people, and to protect them from the tyranny of the majority. The Bill of Rights, which is the first ten amendments to the Constitution, guarantees the rights of the people, and is the cornerstone of the American system of government.

The third fundamental principle is that of the federal system. The Government is organized on a federal basis, with the powers of the national government and the powers of the state governments clearly defined. The national government is responsible for the defense, foreign relations, and the regulation of interstate commerce, while the state governments are responsible for the local government, the police, and the education system.

The fourth fundamental principle is that of the democratic system. The Government is elected by the people, and the people have the right to elect and to remove their representatives. The President is elected by the electors, the Congress by the voters, and the Supreme Court by the President and the Senate. The people have the right to petition the Government, to assemble, and to speak their minds freely.

The fifth fundamental principle is that of the rule of law. The Government is bound by the law, and no one is above the law. The Constitution is the supreme law of the land, and all laws and actions of the Government must conform to it. The courts are the guardians of the Constitution, and they have the power to declare laws and actions of the Government unconstitutional.

The sixth fundamental principle is that of the economic system. The Government is committed to the free enterprise system, and to the protection of property rights. The Government is responsible for the regulation of the economy, and for the promotion of the general welfare of the people.

The seventh fundamental principle is that of the international system. The Government is committed to the maintenance of peace and to the promotion of international cooperation. The Government is responsible for the defense of the country, and for the promotion of the interests of the United States in the world.

let us know immediately whether you can accept?

Very truly yours,
D. E. Page, Company."

which letter, however, was not received by plaintiff until November 4th, whereupon he again talked with Page over the 'phone, wherein the terms of employment were discussed, an offer was made by defendant and accepted by plaintiff, and plaintiff requested Page to confirm the terms of employment by letter, and accordingly on November 4th defendant addressed the following letter to plaintiff:

"Chicago, Nov. 4, 1918.

"Mr. E. J. Benjamin,
c/o Planter's Hotel, Chicago.
Dear Mr. Benjamin:

"Confirming our telephone conversation, we will be glad to take you on for a trial trip beginning the early part of January, thru the Southwest for a period of six months, terms to be \$250.00 a month and your railroad expenses.

"Will be glad to have you communicate with us some time the latter part of this month or in the early part of December as regards to perfecting arrangements more in detail.

Very truly yours,
D. E. Page,
President and General Manager."

This letter, however, did not reach plaintiff until some time later, he being absent from the city on business; on December 3rd he wrote defendant as requested in that letter, stating he would call in time to get final directions for carrying out his work with defendant company. On December 7th he received from defendant the following letter:

"Chicago, 11/25/18.

"Mr. E. J. Benjamin,
c/o Geo. H. Mayr & Co.,
155 Whiting St., Chicago.
Dear Sir:

"I regret to state that owing to information which I have received from several of your former employers, I shall have to cancel the arrangement that I made with you to travel for us after the first of the year.

"I send you this notice in plenty of time, so that you will be able to make other connections.

Very truly yours,
D. E. Page,
President & Genl. Manager."

On the day this letter was received, plaintiff wrote the following letter in reply:

"D.D.R. Co., Chicago.

"Des Moines, Iowa, Dec. 7th, 1912.

Gentlemen:

"Your letter of the 25th ultimo is received today and hardly know what to think of the contents of same. Of course I have made no other arrangements for next year. I wrote you recently from Waterloo, Iowa, and as stated will call on you on my return to Chicago which will be about 14th or 15th of this month.

Yours truly,
E. J. Benjamin."

There is no question but that the defendant had agreed to employ said plaintiff as set forth in its letter of November 4th, and that plaintiff had agreed to accept said terms of employment. Defendant, however, maintains that said letter was not the entire contract but a statement made by plaintiff to defendant in the negotiations leading up to the writing of that letter, wherein plaintiff represented that he was competent and of good and steady habits, and that his former employers would verify such representation, and the reply thereto by Mr. Page on behalf of the defendant, that his employment would depend upon the ability of plaintiff to furnish references as to his good and steady habits, constituted part of the contract. While plaintiff contends that the agreement of November 4th was complete in itself and therefore could not be varied by evidence of conversations had prior to the sending of that letter, yet he further contends that not in any of the negotiations did the question of his references arise; that he did state where he had been employed but made no representations that his former employers would furnish references as to his being of good and steady habits.

Upon this issue of fact we have the testimony of the plaintiff on his own behalf, and that of Page and Miss Smith on behalf of defendant. The testimony of Page and the plaintiff is conflicting, and that of Miss Smith neither corroborates the contention of

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the defendant nor contradicts that of the plaintiff.

The court, in finding the issues for the plaintiff and entering judgment against the defendant, evidently believed the testimony of the plaintiff upon this question of fact. The court, trying this case without a jury, saw and heard all the witnesses, and in arriving at its conclusion, had the right to take into consideration their appearance and demeanor while on the stand. We would not be warranted in disturbing such finding of the court unless it is clearly and manifestly against the weight of the evidence. In Hess v. Killebrew, 308 Ill. 193, the court say on this point (p.300):

"Where the trial court, in a trial without a jury, has had an opportunity of seeing the witnesses and of hearing their testimony as it is delivered orally, the findings of such court upon mere questions of fact, when the testimony is conflicting, will not ordinarily be disturbed, on appeal, unless such findings are clearly and manifestly against the preponderance of the evidence." (Citing cases.)

As we view the evidence in the case, we are unable to say that such finding is clearly and manifestly against the preponderance of the evidence.

The determination of this issue in favor of the plaintiff disposes of all the other issues involved.

Finding no reversible error, the judgment of the Municipal court will be affirmed.

AFFIRMED.

THE UNIVERSITY OF CHICAGO

THE CHICAGO SCHOOL OF THEOLOGY

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BUYERS INDEX PUBLISHING CO.,
Plaintiff in error,
vs.
TRINER SCALE & MANUFACTURING CO.,
Defendant in error.

MEMORANDUM TO

MUNICIPAL COURT

OF CHICAGO.

1941.A.427

STATEMENT OF THE CASE. This is a suit brought by the Buyers Index Publishing Company, plaintiff in error, hereinafter referred to as the plaintiff, against the Triner Scale & Manufacturing Company, defendant in error, hereinafter designated as the defendant, for moneys due for advertisements in the Buyers Index (published monthly) for one year during 1907 and 1908, as per agreement entered into between plaintiff and defendant, June 28, 1907, for the agreed price of \$1000 less the amount paid thereon. On the trial below, the jury returned a verdict in favor of the defendant, upon which verdict the court entered judgment for the defendant and against the plaintiff for costs; to reverse which plaintiff has sued out this writ of error.

Plaintiff's statement of claim sets forth the contract upon which was based its cause of action, which is as follows:

"The stereotype plate of the Spanish Writeup to be furnished.

BEFORE SIGNING THIS CONTRACT MANUFACTURERS ARE REQUESTED TO READ IT IN ITS ENTIRETY.

Chicago, Ill.

Date June 28, 1907.

Buyers Index Publishing Co., 59 Pearl Street,
New York.

Gentlemen:

Please insert our illustrations, descriptions, etc., to occupy in advertising section only, of the 'Buyers Index' (copyrighted), (published monthly in alternate English and Spanish editions) 1/2 page, English and Spanish Editions, for full year term.

1. We will, within ten days furnish to your order, matter, cuts, etc., subject to your approval, for printing same. If not furnished you are at liberty to prepare and print such matter as you may consider proper.

2. It is understood that we will, within five days from date of receipt thereof, return to you corrected the proof which you are to submit to us before issue. If proof is not returned, you are to conclude that it is

satisfactory to us. Copies of Index containing our advertisement to be mailed to us free of expense.

3. It is clearly understood that the conditions above and herein set forth embody all agreements and understandings concerning this present contract, as made or had with said Buyers Index Publishing Co., its agents or employees acting in its behalf, either written or verbal.

4. In consideration of the above we agree to pay to your order (\$225.00 two hundred and twenty-five 00/100 dollars payable one-quarter said amount cash at date of third issue in which our advertisement appears, balance quarterly thereafter. Full amount \$225.00.

Name Triner Scale & Mfg. Co.
By J. W. Triner.
Address 1255 W. 21 St.

Erwin de Montpelier
Representative Buyers Index.

XXXXXXX
XXXXXXX
XXXXXXX

Erwin de Montpelier

that there was due on said contract the sum of \$168.75.

To this statement of claim defendant filed an affidavit of veritas setting forth that the plaintiff had not complied with all the terms and conditions as agreed upon in said contract, and that therefore said contract had become canceled, and that whatever advertising had been furnished prior to the said cancellation was paid for; wherefore defendant was in no wise indebted to said plaintiff.

MR. JUSTICE BAK DELIVERED THE OPINION OF THE COURT.

The evidence shows that the contract set forth in the statement of claim was signed by the defendant on June 27, 1907, and accepted by the plaintiff on July 3rd. Defendant contends that at the time said contract was executed by defendant, one Erwin de Montpelier, a representative of the plaintiff, made certain agreements with reference to securing lists, writing an editorial in Spanish to be printed in the said publication, and stereotype plates of said editorial writeup to be furnished defendant by the plaintiff; that these agreements were written on a separate piece of paper which was pasted on the back of the printed form of contract, and constituted a part thereof; that the face of it was in form as

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OFFICE OF THE ADJUTANT GENERAL
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set forth in the statement of claim, without the following writing in the upper margin:

"The stereotype plate of the Spanish writeup to be furnished."

and without the following language in the lower margin:

"A list of names of hardware dealers to be furnished and translations of incoming and outgoing correspondence attended to during the term of this contract without extra charge."

J. M. Triner testified on behalf of defendant that two or three days after the contract had been signed, the said de Montpelliér called him on the telephone and stated that the paper that had been pasted on the back containing the special agreements between the parties had become lost, and that he had written on the face of the printed form of contract the substance of the special agreements entered into; that he was the editorial writer and would see that these extra conditions agreed upon were fulfilled, and requested that he make no mention thereof to his principal. Triner testified that he acquiesced in the suggestion made by the representative of the plaintiff; that the contract offered in evidence contained his signature; that it was the contract he signed, save the writing in the margin, ~~and~~^{and} that the paper containing the extra conditions was not pasted on the back. Plaintiff's testimony showed that the contract set forth in the statement of claim and offered in evidence was the contract it had received from its representative, de Montpelliér, and which it had accepted on July 3rd, 1907, and under which the advertising had been printed in its publication.

From the evidence in the case, there is no question that the contract introduced by plaintiff must be regarded as the contract of the parties. While Triner testified that it had attached thereto a paper containing other conditions, and though his testimony be taken as true, yet he knew that said paper had become lost, having been informed that the conditions therein were written on the printed form, and requested not to make mention of that fact to the plaintiff.

He did not ask to be shown the paper so he might judge for himself whether or not plaintiff's representative had incorporated in writing in the contract the extra conditions agreed upon; he simply acquiesced therein, and therefore he cannot complain at this time that the contract as it appears in the record in this case is not his contract.

If, however, there is any language in this contract, either in the printing or in the writing, which is ambiguous and the meaning of such language can be explained by parol evidence, then defendant had the right to introduce parol evidence to interpret the contract in its present form. There is language in this contract the meaning of which, in our opinion, is doubtful, namely, that written in the margin and heretofore mentioned. The parol evidence tended to show that plaintiff had agreed to write an editorial in Spanish, to be inserted in the newspaper in its publication, and that the stereotype plates used in printing such writeup would be furnished defendant for its use, so that it might have pamphlets made containing this Spanish writeup, to be distributed for its benefit. Without this parol testimony the words in the upper margin, "The stereotype plate of the Spanish writeup to be furnished," would be difficult of interpretation. While the writing in the lower margin of the contract might not be considered doubtful, yet the parol evidence offered tended to clear up its meaning. Therefore, the parol evidence offered by defendant from which the court and jury could arrive at the meaning of the words in the margin, was properly admitted.

Defendant contends further, that plaintiff did not carry out its promises with reference to preparing and printing in its publication an editorial written in Spanish, and that consequently no stereotype plates were furnished from which the pamphlets containing such writeup could be prepared and used for the benefit of de-

The first of these is the fact that the
 government has been successful in
 its policy of maintaining a high
 level of employment. This has been
 achieved by a combination of factors,
 including a strong and growing
 economy, a high level of investment
 in infrastructure, and a high level
 of government spending. The result
 has been a high level of employment
 and a high level of economic growth.
 The second of these is the fact that
 the government has been successful in
 its policy of maintaining a high
 level of social services. This has been
 achieved by a combination of factors,
 including a high level of government
 spending, a high level of investment
 in infrastructure, and a high level
 of government spending. The result
 has been a high level of social
 services and a high level of economic
 growth. The third of these is the fact
 that the government has been successful
 in its policy of maintaining a high
 level of environmental protection. This
 has been achieved by a combination
 of factors, including a high level of
 government spending, a high level of
 investment in infrastructure, and a
 high level of government spending. The
 result has been a high level of
 environmental protection and a high
 level of economic growth.

defendant: that this constituted a breach of contract on the part of the plaintiff, and therefore defendant requested plaintiff to discontinue its advertisement in the publication. and the defendant offered testimony to support its contention.

Plaintiff contends that the contract as it appears in evidence, is explicit and definite in its terms, and is no way ambiguous. He, however, have held that the words in the margin were of a character that needed explanation in order that the court and jury might arrive at a proper construction and interpretation thereof.

Plaintiff contends further, that the said Triner had at a previous trial of the case testified to a different state of facts with reference to the contract itself, namely, that the extra conditions which defendant claims the benefit of here were not pasted on the printed form of contract but were written on a card and pinned thereto; furthermore, that the letters in evidence in the case contained no complaint on the part of the defendant that an editorial in Spanish had not been written or plates furnished, but on the contrary, the correspondence showed that the defendant's claim that the plaintiff had not complied with all the provisions of the contract was but an afterthought and merely a subterfuge to escape the obligations of the contract. In support of these contentions ~~the~~ plaintiff offered testimony showing that defendant had furnished material from which copy the advertisement was prepared that appeared in its publication for three months; that thereafter, no further material was furnished for use of the plaintiff in preparing advertisements, but plaintiff nevertheless continued the insertion of the advertisement as it had appeared, for the entire period of one year, which it contended was its right and duty under the contract. Plaintiff, in further support of its contention, offered to prove that in a certain conversation had between Mr. Hudson, counsel for plaintiff, and

J. W. Triner, the only witness on behalf of the defendant, in the hallway of the court house, just prior to a former trial of this case, that Mr. Triner stated to Mr. Hudson, in the presence of his own counsel, that at the time the agreement was entered into between himself and the representative of the plaintiff, the added provisions which defendant contended were written on a piece of paper pasted on the back of the printed form of the contract, were in fact written on a card and attached to the contract with a fastener. Plaintiff was entitled to have this testimony in evidence before the jury, as affecting the credibility of Mr. Triner.

To prove this fact, plaintiff's attorney, Mr. Hudson placed upon the stand the attorney for defendant who was present at the time this conversation was had, but the court sustained objections to questions which would bring forth this testimony, on the ground that said conversation was in the nature of a confidential communication. The record shows that the character of the objection was suggested by the court.

There is serious doubt whether or not such conversation can be considered a confidential communication. This conversation took place between a witness for the defendant and counsel for the plaintiff, and the fact that counsel for defendant was present, was a mere coincidence.

To support plaintiff's contention that the correspondence showed that plaintiff had done all required of it under said contract and that defendant merely sought to avoid the contract because it was not bringing returns, counsel for plaintiff, in his argument to the jury, asked to read a letter under date of January 31, sent by plaintiff to defendant, and to comment thereon. Objection was made, on the ground that the letter had not been offered in evidence. The court stated that such letter was not in evidence. The file mark shows that it was in evidence. The court, however, sustained the objection and the argument of plaintiff was concluded without the letter being read to the jury and commented on. Afterwards counsel for defendant admitted that the letter was in evidence, and withdrew the objection; whereupon counsel for plaintiff asked leave to address the jury and comment upon said letter. The court then permitted it to be read, but refused to allow counsel to comment thereon to the jury.

As we read this letter of January 31, it supports the contention of the plaintiff in this case, and counsel had the right to comment upon this letter (which was plainly marked defendant's Exhibit "A"), in his argument to the jury, and that the refusal of the court to permit him to do so was harmful error.

Plaintiff also complains that the court erred in refusing to give to the jury certain instructions requested by it. Among those requested was the following:

The following instruction for the plaintiff was refused.

"You are instructed that if you find from the evidence that the defendant's manager, Mr. Trimer, signed an order at the solicitation of the plaintiff's solicitor, and that said solicitor had no authority from the plaintiff to make a contract but only to solicit orders, and that the order contained the clause - 'It is clearly understood that the conditions above and herein set forth embody all agreements and understandings concerning the present contract made or had with the principal, its agents or employees acting on its behalf either written or verbal' - and that a copy of the contract containing such clause was thereafter delivered to defendant and received by it, then the defendant is estopped from setting up as against the plaintiff, after said order has been accepted and filled (if you find it has been accepted and filled) any other agreements or representations not embodied in said written order, unless there was fraud on the part of the solicitor in securing the signing and execution of said order."

While perhaps this instruction may not have been proper in form, yet in view of the contention between the parties, the substance thereof should have been given, and the court instructing the jury orally should have given instructions including the subject matter requested in this instruction. The substance of said requested instruction was not covered by any other instruction given by the court.

Another instruction requested was the following:

"You are instructed that the admissions of a solicitor or other agent of a principal are not binding upon the principal unless the admissions are within the scope of the agent's authority, are made with reference to the subject matter of his agency and at the time of the transactions between the parties."

This instruction states the law accurately, and the plaintiff should have had the benefit thereof. The failure to incorporate its substance of these instructions in oral charge to the jury was error.

For the reasons hereinabove assigned, the judgment of the Municipal court will be reversed and the cause remanded.

RE VERSED AND REMANDED.

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MARGARET E. FRENCH,
Appellee,

APPEAL FROM

vs.

CIRCUIT COURT

MODERN WOODMEN OF AMERICA,
Appellant.

COOK COUNTY.

194 I.A. 438

STATEMENT OF THE CASE. This is an action in assumpsit brought in the Circuit court of Cook county by Margaret E. French, appellee, hereinafter referred to as plaintiff, against the Modern Woodmen of America, appellant, hereinafter designated as the defendant, to recover the sum of \$1,000 upon a benefit certificate issued by defendant upon the life of George Edwin French, hereinafter referred to as the insured, in which ~~xxxxxx~~ the certificate plaintiff was ^{the} beneficiary.

The declaration averred that said benefit certificate was issued September 11, 1908; that the said plaintiff, who was the wife of the insured, was the beneficiary named therein; that the insured died March 7, 1911; that the terms and conditions of said benefit certificate had been complied with. A copy of said certificate was attached to and made a part of the declaration. Defendant pleaded the general issue and a number of special pleas, in the second of which it was alleged that the insured had made false answer to a question propounded to him by the medical examiner of the defendant, in his application for membership in the defendant organization; that in said application he warranted the answer to said question to be true; that the insured further agreed in said application that if any answer be untrue, he would forfeit all rights under the said certificate; that the false answer was to the effect that the insured had not been treated by or had consulted a physician professionally, within seven (7) years prior to the time of his application. To this and the other special pleas plaintiff filed a general replication. On the trial below, the jury re-

turned a verdict for the plaintiff, assessing her damages in the sum of \$1,133.32, upon which verdict the court entered judgment, to reverse which this appeal has been prosecuted.

MR. JUSTICE PAM delivered the opinion of the court.

A determination of the issue presented by the declaration, the second special plea and the replication, disposes of all points raised on this appeal. ~~The evidence shows that~~ In his application for a benefit certificate, the insured warranted that the answers to questions propounded to him in the medical examination were correct and true, and further, ~~that he~~ agreed that if any of these answers were not true, the certificate issued should be null and void, in which event neither he nor his beneficiary should be entitled to any benefits under the certificate. The application containing the questions and answers made thereto in the medical examination, was signed by the insured. Question No. 14 in said application consisted of three parts, viz.:

"(a) Have you, within the last seven years, been treated by or consulted any physician or physicians in regard to personal ailment?"

"(b) If so, give dates, ailment, duration of attack, and physician's or physicians' names and address.

"(c) Was recovery complete?"

The answer of the insured to (a) was "No," consequently the remaining parts of said question were not answered, and in fact did not require answer. This medical examination was under date of August 31, 1904. *The defendant has been - Plaintiff's attorney*

a The evidence further shows that The insured first called at the office of Dr. George E. Stubbs on May 17, 1904; that Dr. Stubbs found upon examination that the insured's ailment was an apparent growing blindness; that within a short time thereafter he concluded that the insured was afflicted with syphilis; that he treated the insured at 30 different times during May, 44 times during June, and 20 times during July, 1904; that he continued to treat the insured many times during the year 1904; that after 1904

he did not see the insured again until March 3rd or 4th, 1911, a few days before his death, when the insured again called at his office; that at that time the insured had become so emaciated and wasted that he scarcely knew him.

Defendant also introduced in evidence the death proofs furnished it by the plaintiff. Part of said death proof was designated "Medical Proof of Death," wherein Dr. Stubbs stated that the cause of death was syphilis and tuberculosis; and upon cross-examination when interrogated with reference to such statements testified that he made a mistake in that certificate but the cause of the death was syphilitic tuberculosis, and that that was the fact.

On the trial below there was an issue raised upon the question whether or not the insured had suffered from syphilis; and while, if that had been the only issue in the case, it might be said that there was evidence tending to show that the insured had not been afflicted with this disease, there was, however, no controversy about the fact that the insured had within seven (7) years prior to the making and signing of the application heretofore referred to, consulted ^{a doctor} Dr. Stubbs for personal ailment and that he was treated by him for a personal ailment within that period. The insured, therefore, in answering the question whether or not he had consulted a physician within seven (7) years prior to the making of application, in the negative, clearly gave an untruthful answer. By that answer defendant was denied the further information which would have enabled it to make an investigation as to the character of such ailment, and also as to whether or not there had been a recovery therefrom; all of which information, it must be conceded, would have had a material bearing as to whether or not the insured would have been a good risk. The character of the question indicated that the defendant thought it important to inquire as to the health of an applicant within a certain period. It

was a reasonable requirement, and it was entirely reasonable for the insured to warrant his answer, to a question giving the defendant that information, to be correct and true. The question was neither ambiguous or doubtful or susceptible of any reasonable construction that would avoid the consequences of the warranty. Therefore, this case does not come within the principle of law set forth in Minnesota Mutual Life Ins. Co. v. Link, 130 Ill. 275, but is on all fours with the case of Grosse v. Knights & Ladies of Honor, 134 Ill. 317, wherein the defense was that in the application the insured had made a false answer as to having been attended by a physician or having professionally consulted one within 3 years prior to the examination, while the evidence showed that she had consulted a physician the same year during which her application was made. Mr. Justice Carterright, speaking for the court, though recognizing the principle of law as laid down in Minnesota Mutual Life Ins. Co. v. Link, *supra*, says (p. 34):

"In this case it was agreed that the answers made to the medical examiner should be warranties and that any false or untrue statement or answer should operate to forfeit the rights of the beneficiary. There is nothing in the contract which would give any room for interpreting it differently from the language employed in it, and counsel seeking to sustain the judgment do not contend that such is the case. In any event, the answers made were material to the risk and did not relate to a matter of opinion or judgment concerning which there might be a mistaken but honest belief. * * *

"The only conceivable purpose of the question was to ascertain how long a time had elapsed since she had required the services of a physician, to enable defendant to judge of the state of her health. * * *

"There was no question involving proof as to the construction put upon it by the parties, or any other matter which would take it out of the rule that the construction of it was for the court as a matter of law." (citing cases.)

So in the case at bar, the insured warranted the answer made to the medical examiner and agreed that if such answer was false, all rights to himself or to the beneficiary were to be forfeited. By this question defendant endeavored to ascertain how long a time had elapsed since the insured had required the attention of a physician, so that it might judge the state of his health. There

is no doubt or ambiguity in the language employed as to make it difficult of interpretation; and there can be no question, considering the evidence in this case, that the answer to this question was material to the risk and was not a matter of opinion or judgment concerning which the insured might be honestly mistaken. The application was in writing and was expressly made a part of the contract entered into between the insured and the defendant. Clearly, under the rule of law announced in Crosse v. Knights & Ladies of Honor, supra, there can be no recovery on the benefit certificate in question, ^{under the facts in evidence in this case} and the court should have granted the motion made by defendant at the close of plaintiff's case and again at the close of all the evidence, to instruct the jury to find the issues for the defendant. For its failure to do so, the case must be reversed with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

Finding of facts: We find as a fact from the evidence in the case, that the answer of the insured to the question, "Have you, within the last seven years, been treated by or consulted any physician or physicians in regard to personal ailments?" was untrue; ~~and further, that said insured warranted said answer to be true~~ and further, that said answer was made to a question the subject matter of which was material to the risk.

MAX DRAEGER and OTTO DRAEGER, doing
business as DRAEGER BROTHERS,
Plaintiffs in Error,

vs.

WISCONSIN STEEL COMPANY, a Corpor-
ation, and F. E. MOORE, a Corpor-
ation, Defendants in Error.

BRIDGE TO

MUNICIPAL COURT

OF CHICAGO.

194 I.A. 440

STATEMENT OF THE CASE. This is a suit brought in the Municipal court of Chicago by Max and Otto Draeger, doing business as Draeger Brothers, plaintiffs in error, hereinafter referred to as plaintiffs, against the Wisconsin Steel Company, a corporation, and F. E. Moore, defendants in error and hereinafter designated as the defendants, for moneys due for groceries furnished by plaintiffs to the said Moore, to secure the payment of which the said Moore had given plaintiffs an assignment of all wages due or to become due while in the employ of the said Wisconsin Steel Company. On the trial below, the court instructed the jury to find the issues for the defendants, pursuant to which the jury returned a verdict finding the issues for the defendants, upon which verdict the court entered judgment in favor of the defendants and against the plaintiffs for costs; to reverse which plaintiffs have sued out this writ of error.

MR. JUSTICE PAM delivered the opinion of the court.

Plaintiffs' claim is based upon an assignment of wages dated January 16, 1911, in which the said Moore assigned to the plaintiffs wages earned and to be earned by him, as an employe of the said Wisconsin Steel Company. While the assignment was referred to in the evidence and Moore questioned as to his signature thereon, yet the assignment does not appear in the record. However, both the plaintiffs and the defendants have proceeded upon the theory that the assignment was entered into, and that it was with reference to wages earned and to be earned by Moore as an employe of the

Wisconsin Steel Company. Therefore we shall do likewise.

The evidence shows that at the time the assignment was entered into, about \$250 was due from McCrex to the plaintiffs, and that on January 9, 1914, when a copy of the assignment was served upon the Wisconsin Steel Company, there was due the plaintiffs \$100.95. The evidence further shows that this amount had become due prior to the filing of a petition in bankruptcy by defendant McCrex; that on January 3, 1913, defendant McCrex was discharged in bankruptcy from all debts due and owing by him, including that due the plaintiffs herein.

Plaintiffs contend, however, that the discharge in bankruptcy did not deprive them of the rights that had accrued to them by virtue of the assignment in evidence; and in support of their contention they cite Hallin v. Denham, 309 Ill. 368. Defendants contend, however, that this case does not apply because the court held therein that the discharge in bankruptcy did not render unenforceable a prior assignment of wages to be earned in the future, under existing employment; that the evidence in the case at bar shows that at the time of the assignment defendant McCrex was not in the employ of the Wisconsin Steel Company, and therefore it was not an assignment of wages to be earned in the future, under an existing employment. There is no question that the law makes a distinction between an assignment of wages to be earned in the future under an existing employment and an assignment of future earnings executed by a person before entering the employ of a company by which he expects to be employed. This distinction is recognized in Hallin v. Denham, supra, and in Stromberg, Allen & Co. v. Hill, 170 Ill. App. 745, wherein the assignment was held void so far as it purported to assign wages earned in the future from employers other than present employers. In arriving at that conclusion, the court in the latter case cites from other cases as follows (p. 368):

"In *Hartley v. Tapley*, 2 Gray 538, the court said: 'The rule is, that wages to be earned under an engagement existing at the time of giving the order are assignable; but not money to be earned hereafter under a new engagement.'

"In *Lehigh V. R.R. Co. v. Woodring*, 111 Pa. St. 313, the Lehigh Co. paid Woodring's wages to another under an assignment of future earnings executed before Woodring entered the employ of said company. In a suit by Woodring for said wages, the trial judge gave judgment for the plaintiff in an opinion well worth reading. The Supreme Court said in affirming the judgment: 'The attempt was to assign that which had no existence, either substantial or incipient. There was no foundation or contract on which an indebtedness might arise. It was the mere possibility of a subsequent acquisition of property. This is too vague and uncertain.' The same rule is announced in *Kennedy v. Tierney*, 14 N. H. 528; *Metcalf v. Lineald*, 27 Ia. 443; and *National Circuit Co. v. Consolidated Agencies Co.*, 155 Ill. App. 314."

The undisputed evidence in the case clearly shows that the assignment in question was executed prior to the time defendant Petrow obtained employment from the Wisconsin Steel Company. Consequently the assignment is void. The assignment being void, no claim can be based thereon against the Wisconsin Steel Company; and the discharge in bankruptcy was a good defense to the claim against defendant Petrow. It was, therefore, the duty of the court, as a matter of law, to instruct the jury to find the issues for the defendants.

Finding no reversible error, the judgment will be affirmed.

AFFIRMED.

204.95-

805

Defendant in Error,

vs.

Plaintiff in Error.

1941.A. 441

STATEMENT OF FACTS.

Defendant in error sued Fred Thoms and Otto Thoms for damages sustained by reason of having been bitten by a dog alleged to have been the property of the defendants. A verdict for \$4,500 was rendered in favor of the plaintiff, upon which judgment was entered. This writ of error is prosecuted by Fred Thoms alone; an order of severance having been entered by this court.

This is the second time plaintiff in error has attempted to secure a reversal of the judgment in this court. Originally this case came up on appeal, which, however, was dismissed, the reasons therefor appearing in the opinion filed by this court in Wisher v. Thoms, 100 Ill. App. 33. At the time defendant in error moved to dismiss the appeal, she also moved to strike the bill of exceptions from the record of this court. In view of the fact that the appeal was dismissed, it was unnecessary for this court to pass upon that motion. Upon dismissal of the appeal, plaintiff in error sued out the writ of error here-in, and defendant in error in this case again moved to strike the bill of exceptions from the record.

The judgment complained of was entered April 7th, 1913, on which day an appeal was prayed (the appeal hereinabove referred to) and leave given defendants to file a bill of exceptions within 50 days from April 7th. On May 24th, 1913 a bill of exceptions was presented to the Honorable Henry V. Freeman, trial judge, who marked same "correct," as of that date. Without being signed by the trial judge, it was filed with the clerk of the Superior Court May 27th, 1913;

and by stipulation of the parties, this so-called bill of exceptions was incorporated in the record filed in this court September 23rd, 1913 on the appeal prayed April 7th, 1913. While the appeal was pending, after a motion had been made by appellee (defendant in error herein) to strike the so-called bill of exceptions from the record because it had not been signed by the trial judge, appellant (plaintiff in error herein) obtained leave of this court to withdraw his so-called bill of exceptions, for the purpose of having it signed. When it was re-filed, it bore the signature of the Honorable Clarence W. Goodwin, and was signed by him on the 33rd day of February, 1914, page 40 line, as of May 26th, 1913. The proceedings that took place in the lower court which led to the signing of the bill of exceptions by Judge Goodwin are shown in the bill of exceptions filed under date of March 21st, 1914. A reading of this bill of exceptions shows that the so-called bill of exceptions was signed by reason of the following or-

der:

"The motion of the defendant, Fred Thom, by his attorney to have the bill of exceptions in this cause signed page 40 line by the presiding judge of this court in the absence of the Honorable Henry V. Freeman, who presided on the trial of this cause; and it appearing now to the court that his Honor, Henry V. Freeman, one of the judges of this court, is absent from the State of Illinois, has been so absent since November 18th, 1913, and all since about the month of July, 1913, and that by reason of his absence and illness, has been since the month of July, 1913, and still is unable to sign the bill of exceptions herein, and it further appearing that said bill of exceptions was presented to his Honor, Judge Freeman, on the 26th day of May, 1913, for approval, being within the time allowed by said court for presenting and filing a bill of exceptions as appears of record in this cause; and it further appearing that the said bill of exceptions was approved by the attorneys for the plaintiff, and the attorneys for the defendants in this cause, and that said bill of exceptions was filed with the clerk of this court on the 27th day of May, 1913, without the signature of his Honor, Judge Freeman, and it further appearing that the attorneys for the respective parties in this cause attended before

The first of these is the fact that the population of the United States was increasing rapidly at this time. This was due to a number of factors, including the high birth rate, the immigration of large numbers of people from Europe, and the discovery of new lands in the West. The second factor was the fact that the economy was growing rapidly. This was due to the fact that the United States was producing more goods than it was consuming, and this was leading to a rapid increase in the standard of living. The third factor was the fact that the government was spending more money on education and other social services. This was leading to a rapid increase in the literacy rate and the overall health of the population. The fourth factor was the fact that the United States was becoming more and more industrialized. This was leading to a rapid increase in the production of goods and services, and this was leading to a rapid increase in the standard of living. The fifth factor was the fact that the United States was becoming more and more democratic. This was leading to a rapid increase in the participation of the people in the government, and this was leading to a rapid increase in the overall health of the population.

The second of these is the fact that the population of the United States was becoming more and more diverse. This was due to the fact that the United States was attracting people from a wide variety of different backgrounds, including people from Europe, Africa, and Asia. This was leading to a rapid increase in the cultural diversity of the United States, and this was leading to a rapid increase in the overall health of the population. The third factor was the fact that the United States was becoming more and more urbanized. This was due to the fact that the United States was producing more goods than it was consuming, and this was leading to a rapid increase in the standard of living. The fourth factor was the fact that the United States was becoming more and more industrialized. This was leading to a rapid increase in the production of goods and services, and this was leading to a rapid increase in the standard of living. The fifth factor was the fact that the United States was becoming more and more democratic. This was leading to a rapid increase in the participation of the people in the government, and this was leading to a rapid increase in the overall health of the population.

this Court by agreement without formal notice in writing, and that the said attorneys for said parties are now in attendance before this Court, in relation to the motion, and after argument of counsel for the respective parties, and the Court being advised in the premises, the Court finds that the Judge presiding on the hearing of this motion is authorized to sign the bill of exceptions nunc pro tunc as of the 26th day of May, 1918, being the day on which the same were presented for approval as aforesaid and the same is accordingly signed, and ordered filed nunc pro tunc as of that day, to-wit: the 26th day of May, 1918.

"To the entry of which order, the plaintiff consents and the plaintiff is given five days time to present her bill of exceptions herein."

The appellee in that case (defendant in error here) then renewed her motion to strike from the record this so-called bill of exceptions signed by Judge Goodwin; which motion, as already stated, was not passed upon. After the appeal was dismissed, this same record in every respect was filed as the record in this court on April 20th, 1918, in the prosecution of this writ of error.

MR. JUSTICE VAN DELVER delivered the opinion of the court.

In moving to strike the said bill of exceptions from the record, defendant in error urges, among other reasons; that said bill of exceptions was never lawfully signed, and that said bill of exceptions was never signed by any judge of the Superior Court of Cook County having power or authority to sign same. In our view of the case it is unnecessary to state or pass upon the other reasons urged by the defendant in error.

Under section 61 of our Practice Act, any judge may allow and sign the bill of exceptions in case the judge before whom the cause was tried is, by reason of death, illness or other disability, unable to allow and sign such bill of exceptions. In a case, therefore, where a bill of exceptions is neither presented or signed by the judge before whom the case was tried, within the time allowed for such presentation and signing, and afterwards such bill of exceptions is

filed, bearing the signature of another judge, the record must show
 the reason therefor, and such reason must be in accordance with the
 provisions of the statute which permits the signing of the bill of
 exceptions by a judge other than the trial judge. People v. Leary
1914, 236 Ill. 545. In the case at bar, Judge Goodwin, under date
 of March 23rd, 1914, entered an order wherein he found that Judge
 Freeman had been absent from the State of Illinois since November 15th,
 1913, and had been ill since the month of July, 1913, and that by rea-
 son of such absence and illness, was unable to sign the bill of ex-
 ceptions in said cause. He further found that said bill of exceptions
 had been presented to Judge Freeman May 24th, 1913, who approved same
 and marked it "presented;" that the said bill of exceptions had been
 approved by opposing counsel; and that it was filed with the clerk of
 the Superior Court on May 27th, 1913, without the signature of Judge
 Freeman. Judge Goodwin further found that he had authority to sign
 the said bill of exceptions on said 23rd day of March, 1914 quasi pro
tempore, as of May 24th, 1913, the latter being the day on which same
 was presented for approval to Judge Freeman; and that in accordance
 with said finding, he signed said bill of exceptions on March 23rd,
 1914, and ordered it filed quasi pro tempore, as of May 24th, 1913. To
 the entry of this order defendant in error objected. This order was
 entered on motion of the appellant (plaintiff in error herein) in the
 then pending appeal to have the bill of exceptions in this cause
 signed quasi pro tempore by another judge of the Superior Court in the ab-
 sence of Judge Freeman who presided on the trial of the cause. By
 this motion and the order entered thereon, the appellant endeavored
 to comply with section 32, permitting a judge other than the trial
 judge to allow and sign a bill of exceptions. As we read this order,
 however, it is clear from its very language that it does not affirm-
 ately appear that after the bill of exceptions had been presented to

the trial judge for approval, that he was unable, by reason of death, illness or other disability, to sign said bill of exceptions before it was filed with the clerk of the Superior Court; and, moreover, it does not appear from the order or record of the proceedings leading to the entry of said order, that Judge Freeman was unable to sign the bill of exceptions prior to July, 1913, either by reason of death, illness or other disability.

On April 7th, 1913, the court gave appellant (plaintiff in error) 50 days within which to present and file a bill of exceptions. The time for presenting and filing this bill of exceptions expired May 27th. No additional time was requested or granted, nor was the time for filing the bill of exceptions extended. Under the order of court, therefore, the said bill of exceptions should have been presented and signed by May 27th. The record shows that it was presented and so marked by the trial judge, on May 28th, 1913. It was never signed by the trial judge. If, after being marked "presented," the trial judge should have signed it after the time allowed for the filing thereof, and the attorneys for plaintiff in error would have filed the signed bill of exceptions within a reasonable time thereafter, it would still have been a proper bill of exceptions, and in such case it would not have been necessary to file the bill of exceptions now and here, as of the day of presentation. This xxxxxx is upon the presumption that after presentation to the court and before signing, it is in the hands of the court; and therefore, if the bill of exceptions is not signed within the time allowed, the cause for the delay is chargeable to the court and not to the parties charged with the duty of presenting the bill of exceptions. But the rule has been repeatedly laid down that the bill of exceptions, once having been signed, the parties charged with presentation and filing thereof, must file same within a reasonable time after signature. Wall v. H. E. Charnick Co., 200 Ill. 242; Wall v. Royal Valetins, 232 Ill. 125; Wall v. Marshall, 121 Ill. 321.

the bill of exceptions, said (p. 220):

"The duty imposed by the law upon the party alleging an exception, and desiring to have the erroneous ruling and judgment reviewed in an appellate court, is to present his bill to the trial judge for settlement and allowance, signature and sealing, at the term when such alleged erroneous ruling or judgment was made, or within such time as the parties, by their agreement, made part of the record, might stipulate, or within the time allowed by the court in its order to that effect appearing in the record, has been often affirmed by this court. The reducing of the exception to writing, and the forwarding of it to the judge in the form of a bill of exceptions, was, by the statute, cast upon the exceptor, and being matter under his control, the law would not permit an excuse, for, as we have seen, if for any reason there was not time during term for him to perform the requisite labor, the court could, on application, by its order, extend the time into vacation, or even to the succeeding term. By the statute it was made the duty of the trial judge to sign and seal every such bill so tendered, and when the judge neglected or refused to sign a true bill tendered in apt time, such neglect or refusal, it was held, in no way affected the right of the exceptor, for the reason he had done all that the law required him to do. Smith v. Brown, 33 Ill. 225."

This ruling has been followed in the other cases already cited.

The provision in section 21 permitting another judge to sign the bill of exceptions was only to provide for a contingency that might arise, for which none of the parties were responsible, namely, the disability of the court. To obtain the benefit of this departure from the ordinary rule obtaining, it must affirmatively appear that the contingencies are such as are contemplated by the language of the statute providing for such departure. People v. Richmond, supra. We have already stated that not an iota of evidence appears why this bill of exceptions was not signed by Judge Freeman either before May 27th or during the five weeks between May 27th and the time when Judge Main's order found his disability begun. We believe the only explanation lies in the fact that counsel either forgot to secure the signature of Judge Freeman or thought it unnecessary. We are further

filed in this case by the fact that the record containing the bill of exceptions unsigned by Judge Freeman was filed in the Appellate Court on September 23rd, 1912. It was only after the motion was made to strike said bill from the record that leave was obtained from this court - where the case was then pending on appeal - to withdraw the record for the purpose of having it signed. This was nearly a year after judgment had been entered and the appeal allowed. To believe it was the making of this motion that caused the appellant (plaintiff in error herein) to realize that the bill of exceptions had not been signed, and that unless it were signed it would be of no avail to secure a review of the case. When they sought to remedy this error, it was found that, as appeared from the order of Judge Goodwin, the trial judge was unable to sign said bill of exceptions by reason of illness and absence from the State, but the order did not extend the disability of Judge Freeman further back than July, 1912; leaving a period of time unaccounted for which, as we have heretofore said, remained unexplained both in the order of Judge Goodwin or by any other fact appearing in the records; which impels us to hold that no bill of exceptions has been filed in this case. We are therefore of the opinion that the motion to strike the bill of exceptions from the transcript of the record must be allowed.

All the assignments of error are based on such bill of exceptions, save one, namely, the error that the court did not grant defendant's motion in arrest of judgment for failure of the declaration to state a cause of action; which assignment of error can be determined from the common law record in the case. After a careful reading of the declaration, we are of the opinion that each and every count therein did state a cause of action, and that the court properly overruled defendant's motion in arrest of judgment.

As all the other assignments of work are based on the bill of exchange, and none having been withdrawn, there is nothing left for this court to take upon in the further prosecution of this suit of error. The judgment must therefore be affirmed, and it will be so ordered.

BILL OF EXCHANGE
AND JUDGMENT AFFIRMED

The first of the following three is the most important, and it is
the only one which is not a mere statement of fact, but a
statement of a principle which is of great importance in the
theory of the subject.

The second of the following three is the most important, and it is
the only one which is not a mere statement of fact, but a
statement of a principle which is of great importance in the
theory of the subject.

The third of the following three is the most important, and it is
the only one which is not a mere statement of fact, but a
statement of a principle which is of great importance in the
theory of the subject.

The fourth of the following three is the most important, and it is
the only one which is not a mere statement of fact, but a
statement of a principle which is of great importance in the
theory of the subject.

The fifth of the following three is the most important, and it is
the only one which is not a mere statement of fact, but a
statement of a principle which is of great importance in the
theory of the subject.

The sixth of the following three is the most important, and it is
the only one which is not a mere statement of fact, but a
statement of a principle which is of great importance in the
theory of the subject.

The seventh of the following three is the most important, and it is
the only one which is not a mere statement of fact, but a
statement of a principle which is of great importance in the
theory of the subject.

The eighth of the following three is the most important, and it is
the only one which is not a mere statement of fact, but a
statement of a principle which is of great importance in the
theory of the subject.

205-00

806

104

205-00

EMILY KUDACHY and ROSINA RUBIN,

Defendants in Error,

vs.

ABRAHAM T. KUDACHY and JACOB KUDACHY,

Plaintiffs in Error.

FILED

JANUARY 1942

OF CHICAGO.

194 I.A. 442

~~On~~ ~~the~~ ~~trial~~ ~~the~~ ~~court~~ ~~delivered~~ ~~the~~ ~~opinion~~ ~~of~~ ~~the~~ ~~court~~.

~~This is a suit brought in the Municipal Court of Chicago by~~
~~Emile Kudachy and Rosina Rubin, defendants in error and herein-~~
~~after referred to as the defendants, versus Abraham and Jacob Ku-~~
~~dachy, plaintiffs in error and herein after designated as the defen-~~
~~dants, to recover damages for breach of contract of warranty in~~
~~and about the purchase of certain realty in the State of Indiana.~~
~~On the trial before a court without a jury, it was found~~
~~the issue in favor of the plaintiff, and on such finding entered~~
~~judgment against the defendants for the sum of \$100.00; to reverse~~
~~which defendants have sued out ^{an} writ of error.~~

~~The written evidence of the agreements of the parties con-~~
~~sists, first, of said defendants' receipt to said plaintiff and~~
~~the plaintiff's contract. This instrument was offered in evidence~~
~~and asked plaintiff's "admission" and proven as follows:~~

"Given in Witness
 Real Estate.

GARY, Ind., Dec. 18, 1941.

"Received of Mrs. E. Kudachy and Mrs. R. Rubin the
 sum of fifty dollars as deposit and earnest money to ap-
 ply on the purchase of lots situated in Lake County, In-
 diana, to-wit: lots number eleven (11), twelve (12),
 and thirteen (13) in block number twenty (20) in the
 Chicago Toiletation Land and Investment Company's Third
 Addition to Toiletation, and now in the City of Gary.
 The price of which is twenty-six hundred dollars
 (\$2,600), purchase to assume all unpaid installments
 of special assessments which shall become due after
 date hereof. Balance of twenty-five hundred and fifty

dollars (\$5,000) to be paid within ten days after delivery of abstract. This receipt is made subject to the approval of the owners.

Abraham and Jane Gordon,

By Captain and Reiner, Agts.,

Per W. C. Reiner."

and, second, a warranty deed offered and received in evidence, marked Plaintiffs' "Exhibit B" which reads as follows:

WARRANTY DEED.

"BEFORE ME, JAMES W. WILKINSON, Clerk of the County of Cook, State of Illinois, do hereby certify that Abraham W. Gordon, Pauline Gordon, his wife, and Jacob Gordon, her husband, his wife, of Chicago, Cook County, in the State of Illinois, County and State of Illinois, do hereby certify and warrant to James W. Wilkinson and William Rubin of Chicago, Cook County, in the State of Illinois, for and in consideration of twenty-six hundred dollars, the receipt whereof is hereby acknowledged, the following described real estate in Cook County, in the State of Illinois, to-wit:

"Lots Nos. Eleven (11), Twelve (12) and Thirteen (13) in Block No. Twenty (20) in the Chicago-Yorkland Land and Investment Company's Third Addition to Chicago, as in and to the plat of map. This conveyance is made subject to all special assessments and taxes after the 15th day of October, 1910.

"IN WITNESS WHEREOF, the said Abraham W. Gordon, Pauline Gordon, his wife, Jacob Gordon, her husband, his wife, have hereunto set their hands and seals this 10th day of September, 1910.

JACOB GORDON

RAY GORDON

ABRAHAM D. GORDON

PAULINE GORDON

(Seal)

(Seal)

(Seal)

(Seal)"

(Witness's Seal)

The entire controversy revolves about the following covenant in the deed:

"This conveyance is made subject to all special assessments and taxes after the 15th day of October, 1910."

Plaintiffs contend ^{ed} that ~~thereby~~ defendants obligated themselves to carry ^{the} property free and clear of all special assessments and taxes levied or payable prior to the 15th day of October, 1910: and

THE UNITED STATES OF AMERICA
DO hereby certify that

the within and foregoing is a true and correct copy

of the original as the same appears in the

records of the

Department of the Interior, Bureau of Land Management, at Washington, D. C.

in witness whereof

I have hereunto set my hand and the seal of the Department of the Interior, at Washington, D. C., this 1st day of January, 1901.

Very truly yours,
J. M. McKim,
Acting Secretary of the Interior.

Witness my hand and the seal of the Department of the Interior, at Washington, D. C., this 1st day of January, 1901.

JOHN MCKIM,
Acting Secretary of the Interior.

Attest: I have hereunto set my hand and the seal of the Department of the Interior, at Washington, D. C., this 1st day of January, 1901.

Very truly yours,
J. M. McKim,

Acting Secretary of the Interior.

prior to said date a certain street assessment amounting to \$400.00, and interest thereon, had been levied and was payable prior to the 15th day of October aforesaid, for which, therefore, defendants were liable to the plaintiffs. ~~Defendants contend that the language in said covenant is ambiguous and uncertain, because of which they were entitled to introduce parol testimony to explain such uncertainty and ambiguity; furthermore, that the controversy between the parties had been adjusted and payment made in full accord and satisfaction of all claims which the plaintiffs had against the defendants in this controversy; further, that as part consideration of the transfer of the property by the defendants to the plaintiffs, there was an agreement on the part of the plaintiffs to assume payment of the special street assessment in question.~~

In support of their contention, plaintiffs introduced in evidence ~~the various instruments heretofore referred to, namely, "Exhibit A" and "Exhibit B," being the receipt or contract, and the warranty deed respectively; they further offered in evidence what they are pleased to call an exemplified copy of the transcript of the special assessment for the paving of Jefferson street from the south line of the right of way of the Michigan Central Railroad to the north line of Fifteenth avenue, excepting 16 feet at the intersection of Fifteenth avenue, Town of Gary, Lake County, Indiana, including lots 11, 12 and 13 of block 32 aforesaid, which is the property involved in this litigation. This exemplified copy purportedly contains a record of all proceedings by virtue of which plaintiffs claim that the said special assessment was both levied and payable prior to the 15th day of October, 1910. The proceedings set forth therein cover the period from January 14, 1906 to the 15th day of October, 1909. This exemplified copy has attached to it a certificate of the city clerk of Gary, wherein he certifies "that the foregoing is a true and correct copy of the proceedings in re improvement of Jefferson street from the~~

North line of the Michigan Central Railroad Company's right of way to the North line of 15th Avenue, as taken from the record of the Board of Traders of the town of Gary, and from the minutes of the Common Council of the city of Gary;" which records were in his official possession. There is also attached to said exemplified copy the certification of the various officials by which it was certified that said A. L. Snyder was the clerk of the city of Gary. ~~Plaintiffs also called~~
~~the witness S. S. Hansen, a resident of Gary, who knew Snyder for the~~
~~town of Gary during the years 1900 and 1901.~~

Defendants, in support of their contention as hereinbefore set forth, first called one of the plaintiffs under section 33 of the Municipal Court Act, and also attempted to introduce other evidence in support thereof. The court, however, permitted only the evidence of the plaintiff called under section 33 to stand. Objection by counsel for plaintiffs to the other evidence was sustained by the court, upon the ground that it was parol evidence tending to vary a written instrument; and insofar as it tended to show the agreement of the parties, said agreements were prior to the giving of the warranty deed and were merged with the contract and warranty deed. The court, in sustaining the objection, was evidently of the opinion that exhibits "A" and "B" evidenced the agreement between the parties with reference to the sale of the property, and that if there was any ambiguity or uncertainty in the deed as contended for by the defendants, the evidence offered was not of a character to explain same, and was therefore immaterial, incompetent and irrelevant. On this state of the record the court entered the judgment complained of.

While there were many assignments of error, defendants in their brief have argued but few; but in our view of the case it is necessary to pass only upon the first point in their brief, viz.:

"No evidence was offered to show the Indiana laws as to the levying of special assessments or as to the form or requirements of certifications, and the courts

of Illinois do not take judicial notice of the statutes of another state unless the same are introduced in evidence, hence there was no valid proof of a legal assessment."

In their argument, defendants add to this point the fact that there was no proof offered by plaintiffs, of the payment of any assessments or installments thereof, and consequently there was a failure of proof to support the judgment.

Plaintiffs contend that their exhibits "A" and "B" clearly showed the agreement between the parties; that under said agreement defendants had obligated themselves to transfer said property free of special assessments and all taxes levied or payable prior to October 15th, 1910; they further contend that "Exhibit C" - which purported to be an exemplified copy of the transcript of the assessment proceedings - showed that a street assessment had been levied against that property and was payable prior to October 15th, 1910. In offering this exemplified copy in evidence, Mr. Alschuler, the plaintiffs' attorney, stated:

"I offer in evidence an exemplified copy of the transcript showing the special assessment for paving Jefferson street from the north line of Michigan avenue to the center line of the right of way of the railroad, etc., in Lake County, Indiana, including lots 11, 12 and 13 in Block 20, in the Third Addition to Tolleston, which is the property involved in this litigation.

MR. GOUGHENHEAD: "I object to 10. There is no showing that this is the proper proof of the roll.

THE COURT: "I don't think that it is proper. If it is not I will strike it out. Proceed. It may go in subject to the objections."

Thereupon Mr. Holmes was called on behalf of the plaintiffs and gave the following testimony:

"My name is C. C. Holmes, I live in Gary, Indiana, and I am a banker. I was town clerk for the Town of Gary in the years 1909 and 1910.

MR. ALSCHULER: "Mr. Holmes, what was the manner in which special assessments were spread or passed in the Town of Gary during the years 1909 and 1910?"

THE UNIVERSITY OF CHICAGO
DIVISION OF THE PHYSICAL SCIENCES
DEPARTMENT OF CHEMISTRY
CHICAGO, ILLINOIS 60637

TO THE EDITOR OF THE JOURNAL OF THE AMERICAN CHEMICAL SOCIETY
FROM THE DEPARTMENT OF CHEMISTRY, UNIVERSITY OF CHICAGO
SIR: We have the honor to acknowledge the receipt of your letter of the 10th inst. regarding the manuscript of the paper entitled "The Kinetics of the Reaction of Nitrogen Dioxide with Carbon Monoxide" which we are now preparing for publication. The results of our experiments are in good agreement with those reported by you, and we are confident that the data presented in our paper will be of interest to your readers. We are, Sir, very respectfully,
Yours truly,
J. H. COLEMAN
Professor of Chemistry
University of Chicago

RECEIVED BY THE EDITOR OF THE JOURNAL OF THE AMERICAN CHEMICAL SOCIETY
MAY 15 1964
THE UNIVERSITY OF CHICAGO
DIVISION OF THE PHYSICAL SCIENCES
DEPARTMENT OF CHEMISTRY
CHICAGO, ILLINOIS 60637

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MR. SOUWENSCHEIN: "Objected to."

THE COURT: "Is not that provided for by statute?"

THE COURT: "That is provided for by statute and by law, is it not?"

A. "Yes, under the special assessment law of Indiana."

MR. ALLEN: "Yes, with reference to the special assessment for paving Jefferson Street, state whether there was any warrant issued."

MR. SOUWENSCHEIN: "Objected to."

THE COURT: "If he knows of his own knowledge he may state."

A. "There are no warrants for any special assessments."

THE COURT: "Is that your case?"

MR. ALLEN: "Yes."

MR. SOUWENSCHEIN: "I want to renew my motion."

THE COURT: "I will overrule it for the present."

The record does not show any change in the court's ruling on the objection of the defendants, nor does it show any motion made to strike as "Exhibit C." However, propositions of law were submitted to the court which have a direct bearing upon the point in question, viz.:

"PROPOSITION NUMBER TWENTY-ONE: The Court holds as a proposition of law that an exemplified copy of the transcript showing a special assessment levied pursuant to action by the Board of Trustees of the Municipality of a foreign state is not admissible until power to enact the same is shown."

"PROPOSITION NUMBER TWENTY-TWO: The Court holds as a proposition of law that before a primary assessment roll is admissible in evidence it must be shown that the same was spread pursuant to and in accordance with the provisions of the statutes in such respects in force and effect."

The court refused to hold either of these propositions of law, and it must therefore have been of the opinion that the exemplified copy in the form in which it was presented, was sufficient to show a valid assessment existing as a lien against this property on October 15th,

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110. The court could not have come to that conclusion on the theory that said exemplified copy was sufficient to show that a valid assessment had been levied against the property according to the laws of Indiana, for the reasons: First, that the record does not show that the laws of Indiana were introduced in evidence from which it could follow by an examination of the exemplified copy, whether said laws had been supplied with, and, secondly, that there was nothing in the certificate of the clerk attached to the said exemplified copy which showed that the proceedings certified to by him were taken in conformity with the laws of Indiana. The certificate of the clerk that appears in the record merely certifies that the " foregoing is a true and correct copy of the proceedings in re improvement as taken from the record of the Board of Trustees of the Town of Gary, and from the minutes of the Common Council of the City of Gary;" which records were in his official possession. There is nothing in that language from which the court could say that the proceedings were in accordance and in conformity with the laws of Indiana. Plaintiffs seemed to have recognized that fact when they offered the testimony of Holmes, the former town clerk, as to the manner in which special assessments were spread of record in the Town of Gary during the year 1906. When this was objected to, the court asked whether or not this was provided for by statute in Indiana, to which the answer was, "Yes, under the special assessment laws of Indiana." However, the laws of Indiana were not offered in evidence, and the court could not by merely examining the certified copy then before it, arrive at a conclusion as to whether or not the proceedings were in conformity therewith. The court could not, therefore, state that the proceedings showed a valid assessment under the laws of Indiana. If the laws of Indiana were in fact before the court, the record does not show it. We can only proceed upon what the record shows actually took place. Special assessments are xxxxxxxx matters.

XX Statutory regulation, and courts can only take what is

regulations are in the State of Indiana or any other foreign State, by the same being made a part of the record in a given case. Hall v. National Life Ins. Co., 224 Ill. 420. Therefore the objection of the defendants to "Exhibit C" should have been sustained. In the absence of competent proof that an assessment had been levied against this property, payable on or before October 15th, 1910, plaintiffs failed to show that there was a breach of covenant.

Defendants' second contention is also well taken. The record is barren of any proof showing any payment by plaintiffs by reason of said alleged assessment. Even though the court had properly found that there was a breach of covenant, yet without proof by the plaintiffs that they actually paid the assessment in question, the damages from said breach would be only nominal. Manifestly, therefore, the judgment for \$125.00 is unsupported by proof.

In the view that we have taken of this case, much of the evidence offered on the defense would also have to be excluded, as the record shows that defendants, in offering said proof, depended for its competency upon the laws of Indiana. However, as this case must be re-tried, we refrain from any further discussion of any of the issues of fact involved. *

For the reasons hereinabove assigned, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

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HARTVIG ERICKSON and FRED A.
ERICKSON, doing business as H.
ERICKSON & SON,
Defendants in Error,
vs.
A. L. WEINBERGER,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

194 I.A. 444

~~STATEMENT OF THE CASE.~~ This is a suit brought in the
Municipal Court of Chicago by Hartvig and Fred A. Erickson,
doing business as H. Erickson & Son, defendants in error and
hereinafter referred to as the plaintiffs, for commissions earned
by them in securing a purchaser for certain lots owned by A. L.
Weinberger, plaintiff in error, hereinafter designated as the de-
fendant. On the trial before the court without a jury, there
was a finding in favor of the plaintiffs wherein plaintiffs'
damages were assessed in the sum of ~~125~~ ^{and} upon which finding judg-
ment was entered; to reverse which defendant has sued out this
writ of error.

XX

Early in January, defendant ~~who was also in the real~~
~~estate business~~ purchased three (3) lots, which he in turn
sought to sell. Accordingly he telephoned ^{to} several real estate
firms whose signs were on the lots notifying the public that they
were for sale, that he desired them to sell ^{certain lot} these lots. Fred A.
Erickson of plaintiff firm testified that on Saturday January 24,
1914, defendant telephoned him that he wanted to make a quick sale
of his lots, and that he replied that if the selling price was
reasonable, he could find a purchaser; whereupon defendant made
him a price of \$2,100 net to him, and that he might have an com-
mission any sum above that amount; that he (Erickson) replied he
would sell them by the following day. Erickson further testified

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that at 3:45 P.M. the following day (~~Monday~~) he sold the lots in question to one Hoppe, for \$2,400; that he received \$25 as part payment and it was agreed that on the following day a contract of sale would be drawn up and \$175 additional deposit made; that on the following morning between ten and eleven o'clock a written contract was entered into and the additional \$175 paid. Erickson further testified that the said Hoppe was a man of means and able and willing to carry out the terms of the contract; that on the same Sunday he tried several times to reach defendant on the telephone but was unable to do so. Hartwig Erickson, a brother of Fred A. Erickson, and also a member of the plaintiff firm, testified that he also tried to reach defendant by telephone at his office on Sunday, but that he was unsuccessful; that he called at defendant's office early on Monday morning but did not find him in; that he succeeded in reaching defendant by telephone at his home, and told him he had sold the lots in question and that the purchaser had made a deposit; that he was then informed by defendant that he had already sold these lots ^{on Monday} to one Brandt, but that no money had been paid as a deposit, nor had a written contract been entered into, but that his word was given and that he would not break his promise to Brandt; ~~that a conference was then arranged, pursuant to which they met at ten o'clock that morning in the Chicago Title & Trust building, where he met defendant; that they went from there to the office of Mr. Koch, an attorney who represented plaintiffs, wherein a conversation of similar import as had on the telephone early that morning, was had between the parties.~~

There is practically no dispute on these facts, save the testimony of the defendant that during the conversation had at the office of the said Koch on Monday morning after plaintiffs had met defendant at the Chicago Title & Trust Company, defendant stated

~~he had already entered into a written contract with Brandt and had received a deposit. Defendant admitted, however, that at the time he was telephoned to on the morning before coming down to the Chicago Title & Trust building, no deposit had been made nor had a written agreement been entered into. At this point of difference the testimony of the defendant stood alone as against the testimony of three witnesses. Upon this state of facts the court entered a finding upon which the judgment complained of was entered.~~

MR. JUSTICE FAY DELIVERED THE OPINION OF THE COURT.

Defendant contends that plaintiffs had no exclusive agency for the sale of his lots; that therefore he as the owner was not precluded from making a sale thereof himself; that at the time he did make the sale to Brandt he had no knowledge that plaintiffs had already consummated a sale. To this contention plaintiffs reply; first, that they did have an exclusive agency for one day, and second, that they had a purchaser ready and willing to buy upon the terms submitted to them by the defendant, and that defendant had been notified of that fact prior to the time of entering into a binding contract of sale with the said Brandt.

As we see it, the only issue is whether or not defendant had actually entered into a binding contract prior to being notified of the fact that plaintiffs had secured a purchaser willing and able to buy the lots under the terms submitted by defendant.

Among the cases relied on by the defendant is Tryant v. Palmer, 171 Ill. App. 213, wherein the court held that where no exclusive agency was given by the owner to a broker for the sale of property, the owner has the right to make a sale thereof himself. But it also holds that this is true, providing the sale is made before he is informed that the broker has a purchaser ready, able and willing to take the property on the terms offered. If, therefore, no sale had actually been made before defendant received notice that plaintiffs had obtained a purchaser ready, able and willing, under

THE HISTORY OF THE UNITED STATES

the holding in Bryant v. Palmer, supra, defendant would be liable for commissions to the plaintiffs for securing the purchaser. In the case at bar, the trial court was evidently of the opinion that before a sale had actually been concluded by defendant, i. e. before a binding contract had been entered into between defendant and his purchaser Brandt, defendant knew that plaintiffs had already secured Hoppe to buy the property on the terms fixed by defendant, and that said Hoppe was ready, able and willing to carry out the terms of the sale. Defendant in denying liability is forced to rely on the fact that he had given his word to Brandt on Sunday afternoon that he would sell the property to him at a stipulated price, as constituting a valid contract. However, no deposit was made that afternoon, nor was any contract entered into in writing, and it is undisputed in the evidence, that nothing further had taken place before defendant had notice of the action of plaintiffs in securing Hoppe as a purchaser of the lots. Upon the facts testified to by defendant as to what took place between himself and Brandt on Sunday afternoon, no action could be brought to enforce the sale of the property to Brandt. It was a mere verbal arrangement without adequate consideration and lacked the essentials of a binding contract of sale; therefore it was not a sale actually made, which is a requirement under the rule laid down in Bryant v. Palmer, supra. Our conclusion in this regard is amply fortified in Port v. Nash, 42 Ore. 341; 71 Pac. 88, where, in a case almost identical on the facts, the court said:

"It is admitted that the plaintiff did not have the exclusive right to find a purchaser for the property and therefore Nash was at perfect liberty to sell it himself, and, if he did so prior to the time he was informed of a sale by the plaintiff, he is not liable to plaintiff for his commission, unless the efforts of the latter were the procuring cause of the sale, which is not contended. That a real estate broker finds a purchaser, able, ready and willing to purchase upon the terms of the seller, is not enough, under the apparent weight of authority, to entitle him to his commission, but he must either obtain a binding agreement to purchase the property or

bring the parties together, so that the principal also finds a purchaser. If, after the broker has found the purchaser, the owner sells to another person, without knowledge thereof, the broker is not entitled to his commission. This doctrine, however, cannot be invoked as a defense to this action, because defendant had not sold or made a valid contract to sell prior to the time the purchaser secured by plaintiff was introduced to him and expressed not only his willingness, but his anxiety to take the property. The arrangement between defendant and Lane would not constitute a sale within the meaning of the rule stated, nor operate as a revocation of the plaintiff's authority. It was a mere verbal understanding, without any consideration, and had none of the elements of a sale or of a contract for a sale. It was nothing more than an option, subject to revocation by either party at any time."

The facts in evidence show beyond dispute that the plaintiffs had secured a purchaser ready, able and willing to buy the lots under terms agreed upon, prior to the time defendant had entered into a binding contract of sale with a purchaser secured by himself. We are therefore of the opinion that the court properly found that plaintiffs were entitled to their commission.

An additional point is made by defendant with reference to the fact that the court, after finding the issues for plaintiffs, entered a judgment for only \$100, whereas if the court believed plaintiffs' version, there should have been a judgment for \$200. If this constituted error on the part of the court, it was one favorable to the defendant. However, it is clear that plaintiffs were simply allowed the usual commission upon the price at which the purchaser secured by plaintiffs (Hoppe) had agreed to purchase the property in question.

Finding no reversible error, the judgment will be affirmed.

AFFIRMED.

JUSTICES FITCH AND SCANLON SPECIALLY CONCURRING.

We agree that this case should be affirmed, but we do not agree with the legal principal upon which the conclusion is based. We think the evidence tends to prove that Weinberger gave the brokers at least one day to find a purchaser, and that good faith required him not to make a sale himself on that day.

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TEMPLETON LINE COMPANY, a
Corporation,

Defendant in Error,

ERROR TO

vs.

MUNICIPAL COURT

GEORGE A. SCHMIDT and CAMILLO
MARCUCCILLI.

OF CHICAGO.

CAMILLO MARCUCCILLI,

Plaintiff in Error.

194 I.A. 447

~~STATEMENT OF THE CASE. This is a suit brought in the Municipal~~
~~court of Chicago by the Templeton Line Company, defendant in~~
~~error, hereinafter referred to as the plaintiff, against George A.~~
~~Schmidt and Camillo Marcuccilli. Schmidt was a contractor for~~
~~certain work in connection with a building being erected for the~~
~~said Marcuccilli, plaintiff in error, whom we shall hereafter~~
~~designate as the defendant. Plaintiff was a subcontractor who fur-~~
~~nished to the said Schmidt some material to be used in connection~~
~~with the construction of defendant's building. The suit was to~~
~~recover the value of the material and also to have a mechanic's lien~~
~~for such amount against the property of the defendant. Schmidt was~~
~~defaulted for want of appearance and plea. Upon the trial below~~
~~before the court without a jury, the court found the issues for~~
~~the plaintiff and assessed its damages in the sum of, \$25.00, entered~~
~~judgment thereon for \$25.00 and costs, and ordered that the said~~
~~judgment shall constitute a valid lien on the premises of defendant.~~
~~From which the defendant furnished a writ of error.~~
MR. JUSTICE FAN delivered the opinion of the court.

This action was brought under the Mechanic's Lien Act,
Ch. 92, Rurd's N. S. of Illinois, 1911, and the single controverted
question of fact ^{was} ~~is~~ the time of service of the subcontractor's
notice by plaintiff upon the defendant. ^{was} ~~The~~ service itself was con-
ceded, but the date thereof was disputed, and this is the only point
argued by defendant in his brief and argument. Under section 22

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THE ACT

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

~~of the Mechanics Lien Act~~, the last day upon which notice could have been served, was January 2, 1914. Mr. Helleman, the secretary and treasurer of plaintiff company, testified that on January 2, 1914, about 2:45 P.M. he served the necessary notice upon defendant at his home: that he made a memorandum of this fact upon the notice itself. The notice, together with the memorandum thereon was admitted in evidence. He further testified that prior to January 2nd he called defendant's attention to the amount due and stated that unless it was paid by January 2nd he would have to serve a lien notice.

As against this testimony, defendant, in addition to his own testimony, offered the testimony of two other witnesses, ~~namely, his brothers-in-law~~, who he claimed were present at the time the notice was served. Defendant stated that the notice was served January 9th or 10th, and that after keeping the notice in his possession for two or three days, he handed it to his bookkeeper: that he arrived at the date of January 9th or 10th because it was four or five days after he had re-opened his ice cream cone factory, which was about January 5th. Defendant further stated that he told the said Helleman when he served the notice that the money had already been paid to Schmidt and he was not liable therefor. The two other witnesses for the defendant who claimed to have been present at the time of service, testified that the notice was served about the 9th or 10th of January, and they also fixed this date by reference to the time the ice cream cone factory re-opened.

While this presents a conflict in the evidence, yet it was the province of the trial court, sitting without a jury, to weigh and consider this conflict in the evidence and to arrive at a conclusion as to where the preponderance was. In arriving at such determination, the court had the right to take into consideration the intelligence, fairness and means of information of the witnesses, also their appearance and demeanor while upon the stand; their

interest in the suit and the relationship, if any, existing between them and the parties, together with any and all circumstances attendant upon the giving of the testimony. It has been repeatedly held that the mere number of witnesses does not alone determine where the preponderance lies, in a given case. In O.E. & L. B.N. Co. v. Pickson, 33 Ill. 111, where there was conflicting testimony and apparently a greater number of witnesses testifying on one side than on the other, the court said (p.154):

"It is not mere numbers of witnesses that should control, but a variety of considerations enter into the determination as to where the weight lies. Of these are intelligence, fairness and means of information, and corroborating circumstances, which are more immediately under the observation of the circuit judge and jury than of this court, as we neither see nor hear the witnesses testify."

The court, in finding the issues for the plaintiff and entering judgment against the defendant, was evidently of the opinion that the plaintiff had sustained the issues by a preponderance of the evidence. We would not be warranted in disturbing such finding unless it is clearly and manifestly against the weight of the evidence. In Hess v. Killebrow, 303 Ill. 123, the court said (p.200):

"Where the trial court, in a trial without a jury, has had an opportunity of seeing the witnesses and of hearing their testimony as it is delivered orally, the findings of such court upon mere questions of fact, when the testimony is conflicting, will not ordinarily be disturbed, on appeal, unless such findings are clearly and manifestly against the preponderance of the evidence." (Citing cases.)

After a careful examination of the record, we cannot say that the findings of the court is clearly and manifestly against the weight of the evidence.

Finding no reversible error, the judgment will be affirmed.

AFFIRMED.

[illegible]

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113 - 13114.

LOCKPORT CORN FLAKE COMPANY,
Defendant in Error,
vs.
JOHN A. TOLMAN & COMPANY,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

194 I.A. 449

MR. JUSTICE MCANLAN delivered the opinion of the court.

~~This was an action of the fourth class in the Municipal court of Chicago, by The Lockport Corn Flake Company, a corporation, defendant in error, hereinafter called the plaintiff, sued the John A. Tolman & Company, a corporation, plaintiff in error, hereinafter called the defendant, to recover \$53.15, alleged to be due to plaintiff from defendant for the sale of 50 cases of Gold Medal corn flakes at \$1.00 per case. The defendant in its affidavit of merits admitted that it purchased and received the said merchandise, but it denied that it was indebted to the plaintiff in any amount for the same, and it alleged that there had been a complete accord and satisfaction of the claim of the plaintiff. The case was tried before the court without a jury and the plaintiff's damages were assessed at \$53.15. Judgment was entered on the finding and this appeal followed. The plaintiff has failed to file an appearance in this court.~~ *From which the defendant appealed.*

The facts in the case ~~are~~ *are* substantially as follows: Prior to the transaction in question, the Cooked Rolled Oats Company, a corporation, and the predecessor of the plaintiff company, had become indebted to the defendant in the sum of \$12.15, and the George R. Walker Company, a partnership (George R. Walker being one of the partners in the same) had also become indebted to the defendant in the sum of \$50, "for the benefit of the said Cooked Rolled Oats Company." Early in February, 1915, the plaintiff's agent, the said George R. Walker, called on the defendant for the purpose of selling it a certain brand of corn flakes called "Gold Medal" corn flakes. This

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brand had previously been manufactured by the Cook Rolled Oats Company. The defendant refused to buy any of the said corn flakes from the plaintiff unless it assumed the said amounts due to the defendant from the Cacked Rolled Oats Company and the George H. Walker Company. Thereafter, Walker called on the defendant and stated that he was authorized by the plaintiff to make arrangements with the defendant whereby the plaintiff would allow the defendant credit for the said items of \$13.15 and \$50 on its purchases of Gold Medal corn flakes if the defendant would buy its trade requirements of the flakes from the plaintiff. The defendant accepted this proposition and at once gave Walker an order for 50 cases of the flakes at \$1.00 per case, and it received the same in accordance with the said agreement. Walker testified that the contract he made with the defendant was in accordance with instructions that he received from the general manager of the plaintiff company. After the transaction in question, the defendant gave the plaintiff a second order for flakes but this order was filled by Walker through another firm, as the plaintiff company had become bankrupt and had gone out of business. On February 22, 1912, the defendant sent to the plaintiff its check for \$14.52, together with the following letter and statement:

"The Lockport Corn Flakes Co.,
Chicago, Ill.

Dear Sir:

We enclose herewith our Check for \$1.52 in payment for the following invoices. Please place to our credit and oblige.

Yours respectfully,

JOHN A. TOLMAN & COMPANY.

INVOICE	AMOUNT	DISCOUNT	FREIGHT	NET	REMARKS
2/2	80.00	80.	1.52	14.52	Prt. Bill Enclosed.
					Contra Accts. \$50.00
					13.15
					\$63.15."

The plaintiff did not reply to this letter until April 3, 1912, when it sent the defendant a letter acknowledging the receipt of the defendant's letter of February 22, and stating in effect that the understanding that it had with Walker, in reference to arrange-

the first of these is the fact that the
group is not a homogeneous one, but is
composed of several distinct groups of
people, each of whom has its own
interests and its own way of thinking.
The second is the fact that the group
is not a unified one, but is composed
of several distinct groups of people,
each of whom has its own interests
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of thinking. The fourth is the fact
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groups of people, each of whom has its
own interests and its own way of
thinking. The fifth is the fact that
the group is not a unified one, but is
composed of several distinct groups of
people, each of whom has its own
interests and its own way of thinking.

It is clear that the group is not a
unified one, but is composed of several
distinct groups of people, each of whom
has its own interests and its own way
of thinking. The first of these is the
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interests and its own way of thinking.

ment between the parties, was that the defendant was to deduct 10 cents a case for all flakes purchased until the items of \$12.15 and \$50 "were settled up;" that it had given the account of the defendant "credit for cash \$14.82, freight \$1.82, discount 90 cents and 10 cents per case special discount, amount to \$5, leaving a balance on our books due us of \$58.15. If this is not your understanding we would like a letter from you explaining just what you understand the agreement to be with Mr. Walker. We are anxious to get this matter straightened out." The defendant replied to the above letter on April 4, 1912, stating in effect that its understanding of the arrangement was as indicated by the letter and statement of February 22, 1912, and that it had no other understanding with Mr. Walker in reference to the matter. The plaintiff retained the check of the defendant until after the receipt by it of the defendant's letter of April 4th, when it deposited the check in its bank and the same was paid. The plaintiff never answered defendant's letter of April 4th.

The defendant strenuously insists that the judgment of the Municipal court should be reversed without remanding, and has assigned several reasons in support of their contention. In our view of the case, it is only necessary for us to refer to one of the grounds urged by the defendant. The defendant contends that the defense of accord and satisfaction was clearly made out by uncontradicted evidence, and that for this reason alone the judgment of the municipal court should be reversed without remanding. We think this contention is meritorious. The letter and statement sent to the plaintiff by the defendant on February 22 clearly shows that the check was offered in full payment of the present claim of the plaintiff. While the plaintiff in its letter of April 3, 1912, states that it had a different understanding of the contract between the parties than that stated by the defendant in its communication of April 3, 1912, nevertheless, it requested the defendant to write a letter to it and ex-

It is not the purpose of this report to discuss the
details of the various methods used in the study of
the "new" method, but to show the results of the
study. The results of the study are as follows:
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plain just what the defendant understood the agreement with Mr. Walker to be. The defendant in its reply to this letter expressly states that it had no other understanding with Mr. Walker than that indicated in its letter and statement of February 22. The plaintiff, after the receipt of this letter, deposited the check of the defendant without further protest and, apparently, so far as the record in this case shows, acquiesced in the defendant's statement of the account between the parties. Under such circumstances, it would seem to be clear from the authorities that the defense of accord and satisfaction was made out. Retrander v. Scott, 151 Ill. 339; Snow v. Griesheimer, 380 Ill. 104-110; Bennett v. Hudson, 174 Ill. App. 229.

The facts bearing on the defense of accord and satisfaction are uncontradicted, and as it appears that the trial court misinterpreted the law applicable to the case, the judgment of the Municipal Court of Chicago will be reversed, but the cause will not be remanded.

REVERSED.

20293

202 - 20293.

ISAAC H. RICE,
Appellant,

vs.

THOMAS E. DOUGHERTY and
SCHAEFFER PIANO MANUFACTUR-
ING COMPANY,
Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

194 T.A. 462
194 T.A. 462

~~STATEMENT OF THE CASE.~~ Isaac H. Rice, the appellant (here-
inafter designated as the complainant), filed an amended bill of
complaint in the ~~Circuit court of Cook county~~ against Thomas E.
Dougherty and ^{the} Schaeffer Piano Manufacturing Company, appellees
(~~hereinafter designated as the defendants~~). To ^{this} bill the de-
fendants filed a general and special demurrer. The chancellor
sustained the special demurrer and dismissed the bill, and this
appeal followed.

The amended bill alleged that the complainant on January
22, 1900, filed a bill of complaint ~~in the Circuit court of Cook~~
~~county against the defendants~~, alleging that the complainant and
the defendant Dougherty were partners and owners of certain prop-
erty, business and profits in the hands of the defendant, Schaeffer
Piano Manufacturing Company, and praying that an accounting be had
between the complainant and the defendants in relation thereto;
that the facts alleged in said bill of January 22, 1900 were sub-
stantially the same as those alleged in the present one; that it
was further alleged in the said bill of January 22, 1900, that the
matters and things set forth therein constituted a partnership be-
tween the complainant and the said defendant Dougherty; that such
proceedings were had on said bill that on July 18, 1906, a final
decree was given in favor of the complainant and against said de-
fendants; that afterwards on October 30, 1911, the said decree was
reversed by the Appellate Court of Illinois in and for the First
District thereof, (but without a finding of facts) with directions

to the Circuit court to dismiss the bill of complainant; that thereafter an order was entered in the said Circuit court dismissing the said bill pursuant to said directions; "that the said Appellate Court in its opinion held that the said decree theretofore entered was erroneous, if not void, because of its uncertainty and indefiniteness, and because the testimony did not support the allegations of partnership alleged in said bill; that the complainant was not permitted to state a case one way in his bill and make another and different showing by his testimony; to which action and the records and files thereof complainant begs leave to refer for greater certainty. Complainant further represents that the allegations of this bill that the facts herein constitute the said Dougherty a constructive trustee, and as such he is bound to account to and with the complainant herein, were not passed upon or decided in the former case, by the opinion and decision of the said Appellate Court. Complainant therefore commences this new action pursuant to the statutes of the State of Illinois, in that behalf enacted." The bill then states at length the facts relied upon by the complainant (substantially the same as were alleged in the bill filed January 22, 1900), and the complainant alleges that the said "facts" constitute the said Dougherty a constructive trustee, and as such he is bound to account to and with complainant herein, were not passed upon or decided in the former case by the opinion and decision of the said Appellate Court." ~~The~~
~~Special Demurrer alleged:~~ (1) "that the alleged cause of action against these defendants, as shown by the allegations of said amended bill of complaint, has been finally adjudicated and determined upon its merits by the Circuit court of Cook county, Illinois, in favor of these defendants and against the complainant, pursuant to the judgment of the Appellate Court of Illinois, in and for the First District thereof, rendered on the 20th day of October, A.D. 1911;" (2) "that the alleged cause of action against these defend-

acts did not accrue within five years prior to the time of filing said bill, and is barred by the statute of limitations;" "that lapses appear in the delay in bringing this suit, and that no facts are stated in said bill to excuse the delay."

MR. JUSTICE SWANLAN delivered the opinion of the court.

The complainant contends that the chancellor erred in sustaining the special demurrer and in dismissing the bill for want of equity, for the reason that the present case is governed by section 35, chapter 31, Ward's Revised Statutes, which reads as follows:

"In any of the actions specified in any of the sections of said act, if judgment shall be given for the plaintiff, and the same be reversed by writ of error, or upon appeal; or if a verdict pass for the plaintiff, and, upon matter alleged in arrest of judgment, the judgment be given against the plaintiff; or, if the plaintiff be non-suited, then, if the time limited for bringing such action shall have expired during the pendency of such suit, the said plaintiff, his or her heirs, executors, or administrators, as the case shall require, may commence a new action within one year after such judgment reversed or given against the plaintiff, and not after."

The complainant argues that the cause of action set out in the amended bill of complaint in the present case is "a new action commenced within one year after such judgment reversed," within the meaning of section 35; that the Appellate Court, in its judgment of October 30, 1911, reversed the judgment of the lower court and ordered the bill dismissed on the ground that the facts proved did not constitute a partnership as alleged; that it is alleged in the present bill that the facts of the case constitute a constructive trust; that the question as to whether the facts constitute a constructive trust has never been litigated and was not adjudicated by the said judgment of the Appellate Court, and the complainant contends that section 35 covers the present case and saves the complainant from the bar of the statute of limitations.

We think this contention of the complainant is without merit. Where a judgment is rendered in bar of a plaintiff's suit

The first part of the report deals with the general situation of the country and the progress of the work of the Commission. It is followed by a detailed account of the work of the various departments of the Commission, and a summary of the results of the work.

The second part of the report deals with the financial situation of the Commission. It gives a detailed account of the income and expenditure of the Commission, and a summary of the results of the work.

The third part of the report deals with the administrative situation of the Commission. It gives a detailed account of the work of the various departments of the Commission, and a summary of the results of the work.

The fourth part of the report deals with the general situation of the country and the progress of the work of the Commission. It is followed by a detailed account of the work of the various departments of the Commission, and a summary of the results of the work.

The fifth part of the report deals with the financial situation of the Commission. It gives a detailed account of the income and expenditure of the Commission, and a summary of the results of the work.

The sixth part of the report deals with the administrative situation of the Commission. It gives a detailed account of the work of the various departments of the Commission, and a summary of the results of the work.

In a court of competent jurisdiction, section 25 is not applicable in a subsequent proceeding brought by the plaintiff - predicated upon the same facts as were existent in the original suit - even though he had not pursued his proper remedy in the first action. Monney v. Stoughton, 122 Ill. 336. Section 25 applies only in a case where there has been no final adjudication upon the facts upon which the claim is based. Larkins v. Terminal R.R. Ass'n. of St. Louis, 122 Ill. App. 246. "The intent of the statute (section 25) was that the time occupied in an unsuccessful litigation touching a demand - the statutory limitation expiring during the litigation - should not prove a bar, where the merits of the controversy had not been determined, but that a period of one year should be allowed after the expiration of the unsuccessful litigation to bring a proper action to enforce the demand; and this whether the unsuccessful litigation be at law or in equity." (Italics ours.) Larson v. Hutchinson, 25 C. C. A. 343.

The complainant predicated his right of recovery in the former proceeding upon the same state of facts that he relies upon in the present case. The Appellate Court in the former proceeding (Wies v. Bombardier, 146 Ill. App. 185) determined the case upon its merits and ordered the bill dismissed for want of equity and a certiorari was denied the complainant by the Supreme Court. In our judgment section 25 is not applicable to the present case and therefore the chancellor did not err in sustaining the special demurrer of the defendant and dismissing the bill of the complainant, and the decree of the circuit court of Cook county will be affirmed.

AFFIRMED.

ANNA WEIDENMANN, Administratrix of
the Estate of JACOB WEIDENMANN, De-
ceased,
Appellee,
vs.
MOUNT HOPE CEMETERY ASSOCIATION OF
CHICAGO,
Appellant.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

194 I.A. 464

MR. JUSTICE SCANLAN delivered the opinion of the court.

This is an action of assumpsit brought by the appellee, hereinafter called the plaintiff, against the appellant, hereinafter called the defendant, on a contract of employment. The contract, a written one, was dated September 29, 1895, and by its terms the defendant appointed the plaintiff's intestate, Jacob Weidenmann, (now deceased) its landscape engineer and gardener and superintendent of its cemetery grounds, for a term of five years. The plaintiff's intestate entered upon his duties under the same on October 1, 1895. On June 14, 1898, the defendant discharged plaintiff's intestate from further service under the contract, and he brought an action in the Superior court of Cook county on October 22, 1898, to recover damages for an alleged breach of the contract by the defendant. The case was heard before the court without a jury; the issues were found for the plaintiff and judgment was entered on the finding for \$14,700. On appeal, the Appellate Court of the First District sustained the said judgment, but the judgments of the Superior and Appellate Courts were reversed by the Supreme Court, and the cause was remanded to the Superior court for a new trial. (Ill. Hope Cemetery vs. Weidenmann, 139 Ill. 87.) The cause was re-docketed and on February 8, 1899, Jacob Weidenmann died, and on September 24, 1899, by leave of court, Anna Weidenmann, plaintiff in the present action, was substituted as plaintiff in said cause. Thereafter the said action was dismissed for want of prosecution, and thereafter this action was brought. The declaration in the present

action consist^{ed} of the common counts and a special count based on the alleged breach. The defendant filed a plea of the general issue and a plea of the ten years statute of limitations. The plaintiff filed a replication to the plea of the statute of limitations, alleging that in the former action she was involuntarily non-suited on April 2, 1906, and that the present action was brought March 15, 1907, and within one year after the said non-suit, and that it was brought for the same cause of action as the former one. To this replication the defendant filed a rejoinder, denying that the present action was brought for the same cause of action as the former one, and alleging that the former action was for other and different causes of action than the causes of action for which the present suit was brought. The plaintiff filed a sur-rejoinder, again asserting that the causes of action in the two suits were the same. The present case was tried by the court without a jury, and the issues were found in favor of the plaintiff and the damages were assessed at \$14,342, and this appeal followed.

The defendant contends that the present action ~~is~~^{was} barred by the statute of limitations. If this contention is meritorious, it is decisive of the case, and we will, therefore, dispose of it at the outset of this opinion.

A stipulation of facts was entered into by the plaintiff and the defendant, wherein it ~~is~~^{was} stated that the plaintiff was non-suited in the former action on December 22, 1906, and that the present action was brought within a year thereafter. The common law record in the case shows that the present action was begun March 15, 1907. The defendant contends that "the court knows as a matter of fact that more than one year elapsed between December 22, 1907, and March 15, 1907. ~~And~~^{And} ~~the~~^{the} burden then ~~is~~^{was} upon the plaintiff to show that the present suit was started within one year after the dismissal of the former suit and until this ~~is~~^{was} shown the defense of the statute of limitations ~~is~~^{was} good, since it ~~appears in the evidence that~~^{appears in the evidence that} the present

suit was not begun until 17 years after the termination of the contract of employment, and therefore barred except upon the facts set up in the replication. * * * There is no reason why the court should take the stipulated conclusion as having any greater weight than the stipulated date. There is no reason to place greater credence in one than the other. The two are absolutely contradictory and until something is pointed out that will lend greater weight to one than to the other, the court can only say that it cannot tell which is the fact and that the plaintiff has not sustained the burden of proof. * * * Of course we are not attempting to impeach the stipulation; we are simply stating that this stipulation does not make out the plaintiff's case, because the court cannot tell what this stipulation means." For the purposes of this case, it may be conceded that the defendant's contention, that the stipulation in question is insufficient to establish the fact that the present action was begun within one year after the dismissal of the former suit, is correct. It appears, however, that The plaintiff, in her replication to the defendant's plea of the statute of limitations, alleged that the present action was brought within one year after the said non-suit, and set out in haec verba two orders in the former action; one entered December 29, 1905, and the other April 2, 1906. The order of December 29, 1905, recites that the former suit was on that date, by stipulation of the parties, passed, to be taken up on ten days' notice, within ninety days. The order of April 2, 1906, recites that the former suit was on that date dismissed for want of prosecution. Neither the allegation in the plaintiff's replication that the present action was begun within one year after the said non-suit, nor the dates of entry, nor the terms, of the said orders in question, were in any traversed by the defendant in its rejoinder to said replication. The defendant, by its failure to traverse these material allegations in the plaintiff's replication, admitted that the present action was brought within a year after the dismissal of

the former action, and that the order of December 28, 1908, was not an order of dismissal but an order merely passing the case, and also that the former action was dismissed for want of prosecution on April 8, 1909. Simmons v. Jenkins, 70 Ill. 479; Feld v. Goffis, 140 Ill. App. 530; Strong v. Haasterlik, 148 Ill. App. 348; German-American Bk. of Bloomington v. Owens, 143 Ill. App. 211; Leigh v. National H. B. B. Co., 131 Ill. App. 108.

The defendant contends, however, that assuming that the present suit was brought within a year after the dismissal of the former, it is, notwithstanding, barred by the statute of limitations, for the reason that, while "it is true that the cause of action is the same * * * the form of action, the remedy, and the exact claim are entirely different." We are unable to see any merit in this contention. The stipulation of the parties in the present suit recites that the present suit is brought "for the very same cause of action" as the former suit was brought for. Assumpsit is the form of action in both cases and the declaration in each case consists of the common counts and a special count based upon the alleged breach. But the defendant argues that the measure of damages that the Supreme Court held to be applicable in the former case is not applicable to the present case, and "the mere fact that the measure of damages could be different can mean nothing more or less than that the remedy was at least different. If the remedy were the same the recovery must be the same in every case." We think that the counsel for the defendant have misconstrued the effect of the decision of the Supreme Court in the former case. The plaintiff's intestate brought the former suit before the expiration of the contract and he obtained a trial of the cause before that time. The Supreme Court, in passing upon the question of the propriety of the amount of the damages allowed by the trial court, held that the plaintiff's intestate was only entitled to recover the actual loss he had sustained down to the date of the trial.

The amount of the damages that the plaintiff would be entitled to recover in the present case, if she were entitled to recover at all, would of course be larger than the amount that the plaintiff's intestate was entitled to recover on the date of the trial of the former suit, but the measure of the damage would be the same in both cases. If the former suit had been tried on the day that it was dismissed for want of prosecution (15 years after the expiration of the contract) the amount of the damages, in case of recovery, would have been the same that the plaintiff is now entitled to recover in the present suit, if she is entitled to recover at all. We do not wish to be understood as intimating that the mere fact, if it were a fact, that the measure of damages in the present case might be different from that in the former proceeding, would make the present contention of the defendant a meritorious one.

The defendant contends that, under the contract, it had the right, acting in good faith, to discharge Weidenmann, if his services were not satisfactory to it, and that therefore the trial court erred in refusing to hold certain propositions of law submitted by the defendant. It will only be necessary to refer to one of these propositions, reading as follows:

"The court holds as a proposition of law that under a contract for a term of years which provides that the employer shall pay the employee an annual salary, payable monthly on or before the 10th day of each month, for the services of the preceding month during said term, or such portions of said term as the services of the employee may be satisfactory and rendered to the employer, that if the employer is in good faith dissatisfied with the service of the employee, he may refuse to accept the same and discharge the employee for that reason, of which he is the sole judge."

The present contention of the defendant requires a construction of the contract. The following are the parts of the same that are material to the present enquiry.

The contract submitted in evidence Part one of the contract
"Third. Said party of the first part further agrees to pay said party of the second part a salary of thirty-five hundred dollars (\$3,500) per year, for the space of five years, commencing October 1, 1933, payable monthly on or before the tenth (10th) day of each month, for the services of the preceding month, during said term, or such portion of said term as

the services of the said party of the second part may be satisfactory and rendered to said party of the first part.

"Fourth. Said party of the second part, in consideration of the agreements and payments aforesaid, hereby accepts the said appointment upon the terms, conditions and agreements herein contained, and agrees that his entire services, skill and abilities as landscape engineer and gardener and superintendent as aforesaid shall be given and devoted to the employment by, and the interests of the said party of the first part, during said term of five (5) years, and that he will promptly and faithfully do and perform all services pertaining to said positions, that are or may hereafter be required of him, by said party of the first part during said term.

"Sixth. In case of any substantial breach of any or either of the terms of this contract by either party, the other party shall have the right to declare this contract forfeited, and the terms and agreements herein contained shall, upon such declaration being made in writing, be and become thenceforth null and void."

The defendant admits that the covenant requiring the defendant to pay the plaintiff's intestate for satisfactory services rendered implies a covenant on the part of the plaintiff's intestate to render satisfactory services. The plaintiff admits that, under paragraph 3 of the contract, if the services rendered were "not in good faith satisfactory, the obligation to pay is discharged. * * * The association might for slight causes, for insufficient reasons even, for shins and caprices, withhold payments and in the absence of a lack of good faith there could be no dissent by Weidenmann." We think that the plaintiff by this construction admits that the plaintiff's intestate covenanted to render satisfactory services, for the defendant could not refuse payment for services rendered if the same were all that the contract required them to do. Bearing in mind the character of the services to be rendered, we are of the opinion that the defendant, under the contract, could, acting in good faith, refuse to pay for services which were not satisfactory to it, and the plaintiff's intestate was required, under the contract, to render satisfactory services to the defendant.

It is a well settled rule of law in this state that, where the employer agrees to pay for satisfactory services and the employee agrees to render satisfactory services, the employer is the sole judge of the services rendered, and if he is, in good faith, dis-

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satisfied, he may discharge the employe at any time for any reason. Mendall v. Test, 108 Ill. Ill; International Harvester Co. v. Boatman, 182 Ill. App. 474; Bromper v. Spivey, 170 Ill. App. 681. It is clear, therefore, that defendant's action in discharging plaintiff's intestate was warranted, under the contract, if the services of the latter were, in good faith, not satisfactory to the defendant. The trial court therefore erred in refusing to hold the proposition of law now under consideration.

The plaintiff contends, however, that even though the defendant had the right to refuse payment for past services, if the same were not satisfactory, still it had no right, under the contract, to discharge plaintiff's intestate for past services merely because they were unsatisfactory, and that the plaintiff's intestate could only be discharged for a substantial breach of the contract, as provided for in paragraph 5 of the same. What we have already said in reference to the defendant's last contention would seem to adversely dispose of the present contention of the plaintiff. In addition, it might be said, however, that the defendant gave to plaintiff's intestate a written notice of his discharge, and if we are correct in our ruling that the plaintiff's intestate agreed, under the contract, to render services satisfactory to the defendant, a failure to render such services would, in our opinion, constitute a substantial breach of the contract and would warrant the defendant in terminating the same under paragraph 3.

The plaintiff further contends that, "the directors of this association did not regard themselves as entitled to discharge Weidenmann upon this mere caprice or arbitrary dissatisfaction but made up their minds to and did attempt to declare a forfeiture upon written notice under the sixth clause of the contract. The defendant did not in the former suit seriously contend that the association had the right to discharge Weidenmann at their arbitrary pleasure. Having contemporaneously construed their own contract, the directors of the

association should be bound by that construction acted upon by them." There is no merit in this contention. The notice of discharge given to plaintiff's intestate does not purport to be given in accordance with any particular clause in the contract. It merely enumerates certain reasons for the discharge, and one of these is, that plaintiff's intestate "has not performed the duties of pertaining to his position to the satisfaction of the association." Nothing has been pointed out to us, nor have we found anything in the record, which would warrant us in holding that the parties themselves construed the contract so as to exclude any right in the defendant to discharge plaintiff's intestate if his services were in good faith unsatisfactory.

The plaintiff contends that the trial court held that the defendant was not in good faith dissatisfied with the services rendered by plaintiff's intestate and that this finding was amply supported by the evidence. The record does not disclose that the court made any such finding. In fact, it seems clear to us that the trial court did not consider this element in the case at all, and for this reason alone the case must be remanded. It may be that on another trial the plaintiff will be able to sustain the burden of showing that the defendant did not act in good faith ⁱⁿ discharging the plaintiff's intestate.

We do not deem it necessary to notice certain other contentions urged by the parties hereto. For the reasons stated, the judgment of the superior court of Cook county will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

HENRY V. WILLIAMS,
Appellee,

vs.

FRANK PARMELEE TRANSFER COMPANY,
a Corporation,
Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

194 I.A. 468

PER CURIAM. In this case, an opinion was heretofore handed down, Mr. Justice Bradley writing the opinion, reversing the judgment and remanding the case for a new trial. A petition for rehearing was allowed, however, and we have given the case a second careful examination, and the majority of the court have come to the conclusion that the prior opinion should stand without change. The opinion of Mr. Justice Bradley is, therefore, hereby adopted as the opinion of the majority of the court. That opinion was as follows:

This is an action to recover damages for personal injuries alleged to have been sustained by Henry V. Williams, plaintiff, as the result of the running away of a team owned by Frank Parmelee Transfer Company, a corporation, defendant, whereby two trunks in the wagon were caused to fall from the wagon and upon plaintiff while he was at work in a ditch or trench on the east side of Milwaukee avenue, opposite Evergreen avenue, in the city of Chicago. Milwaukee avenue runs in a northwesterly and southeasterly direction, and Evergreen avenue intersects Milwaukee avenue at its west side at right angles, but does not extend east of Milwaukee avenue.) The case was tried before a jury who returned a verdict finding the defendant guilty and assessing plaintiff's damages at \$1000, upon which verdict the court, on December 14, 1912, after overruling a motion for a new trial, entered judgment, to reverse which judgment defendant prayed and perfected this appeal.

Plaintiff's declaration consisted of two counts. In the first count, after alleging that on July 16, 1910, defendant was

engaged in the transfer and express business and owned, controlled and used wagons with horses attached thereto, and that plaintiff was in the employ of the city of Chicago as a laborer, and then and there engaged in working in and around a certain ditch or trench on Milwaukee avenue near Evergreen avenue, plaintiff averred that at the time aforesaid the defendant negligently permitted its certain horses, attached to its certain wagon then and there loaded with trunks, "to be and remain unhitched and unattended and so that said horses were free to run away," and that "through the negligence and carelessness of defendant as aforesaid" said horses, attached to said wagon and so left unhitched and unattended at Evergreen avenue near Milwaukee avenue, public highways in said city, "ran away to and where plaintiff was then and there working as aforesaid," and that, while plaintiff was at all times in the exercise of due care, etc., "said wagon and a trunk falling from said wagon struck plaintiff with force and violence," and plaintiff was thereby injured, etc. The second count averred that at said time there was in force and effect in said city an ordinance, as follows: "1424. (Unfastened) No person shall leave any horse or other animal attached to any carriage, wagon, cart, sleigh, sled, or other vehicle in any public way of this city, without securely fastening such horse or other animal, under a penalty for each offense of not less than \$2 nor more than \$10," and that defendant "negligently and in violation of said ordinance, left its certain horses attached to its certain wagon, without securely fastening said horses," at Evergreen avenue near Milwaukee avenue, public ways in said city, whereby said horses, attached to said wagon loaded with trunks, "were left free to and did run away" to and where plaintiff was working, and said wagon and a trunk struck plaintiff and injured him, etc.

As to the manner in which the accident happened, plaintiff testified that he and other men were working in the ditch when he "heard a holler," which caused him to look around; that he saw the

men near him start to run and so he tried to get out of the ditch as quick as he could; that before he could do so the team^{was} in the ditch and the wagon turned over on its side; that one trunk fell on top of him and another trunk hit him on the leg, and that he was severely and permanently injured. Plaintiff further testified that his position in the ditch at the time of the accident was about on a line with the south building line of Evergreen avenue; that about "five or eight or ten minutes" before the accident he saw the same team and wagon "on the south side of Evergreen opposite a three story building," about "20 or 30 feet" away from the ditch; that the team was "standing there;" that he "didn't see them tied to anything," and that he "didn't see no one around them."

John Cronin, a witness for plaintiff, testified that the team and wagon came from Evergreen avenue and into Milwaukee avenue. Lynaugh, another witness for plaintiff, testified that when he first saw the team "it was coming on a run out of Evergreen, across Milwaukee avenue" and that nobody was on the wagon. Fitzgerald, another witness for plaintiff, testified that when he first saw the team it was "coming down Evergreen avenue, & & about 100 feet from Milwaukee avenue."

Edward Witte, a witness for defendant, testified that on the morning of the accident he was sitting in a park west of Milwaukee avenue and north of Evergreen avenue, that when he first saw the team and wagon they were on Evergreen avenue, "about two blocks west of Milwaukee avenue," that the horses were "going pretty fast" towards Milwaukee avenue, and that "nobody was driving them."

It is contended by counsel for defendant that the verdict is manifestly against the weight of the evidence and that the trial court erred in refusing to grant a new trial.

In the
The gist of the first count of plaintiff's declaration ~~was~~^{it was} that the defendant negligently permitted said team to be and remain "unhitched and unattended" so that it was "free to run away" and that

because of that negligence the team did run away and plaintiff was thereby injured. The second count set forth an ordinance^{#1424} of the city of Chicago which prohibited persons from leaving¹ any horse, or other animal, attached to any wagon or other vehicle in any public street of the city, "without securely fastening such horse or other animal," and it was averred that the defendant "negligently and in violation of said ordinance," left its horses attached to its wagon "without securely fastening said horses," whereby they "were left free to run away and did run away," and plaintiff was thereby injured. Generally, negligence will not be presumed from the mere fact that a horse runs away. 3 Thompson on Negligence, Sec. 7406; Safford v. Rosenbloom, 103 Ill. App. 878. Under the first count of the declaration in this case it was incumbent upon the plaintiff to prove, not only that the said team ran away and injured plaintiff, but also that defendant negligently permitted said team to be and remain unhitched and unattended, and under the second count that defendant negligently left the said horses without securely fastening them. The only evidence in the record tending to prove the said negligence as charged was that of plaintiff, who testified to the effect that "five or eight or ten minutes" before the accident he saw the team and wagon standing on the south side of Evergreen avenue, about "80 or 90 feet" away from the ditch, and that he "didn't see" the team "tied to anything" or "anyone around the team." It is to be noticed that he does not testify positively that the team was not tied at the time he says he first saw the team, or that no one was around the team, but only that he "didn't see" the team tied to anything or anyone around the team. One of plaintiff's witnesses testified that immediately before the accident he first saw the team coming down Evergreen avenue about 100 feet from Milwaukee avenue. This is at a point considerably west from where plaintiff says he saw the team standing a few minutes before. One of defendant's witnesses also testified that when he first saw the team it was

"about two blocks west of Milwaukee avenue" and was "going pretty fast" towards Milwaukee avenue, and nobody was driving the horses. No witness corroborated plaintiff in his statement as to the position of the team and wagon, "five, eight or ten minutes" before the accident. In our opinion, the verdict is manifestly against the weight of the evidence and the trial court erred in not granting defendant's motion for a new trial. "If a verdict is manifestly against the weight of the evidence it is the duty of the trial judge to set it aside and grant a new trial, and a failure to do so is error, for which a judgment must be reversed." Conalson v. E. St. L. & S. Ry. Co., 235 Ill. 825, 828.

It is also contended that the trial court erred in admitting in evidence certain testimony of plaintiff's witnesses, Dr. Vather, and in making certain remarks, claimed to be prejudicial to the defendant, ~~and~~ in the presence of the jury. It will be unnecessary for us to discuss these questions, as on the new trial they will doubtless not again arise.

The judgment of the Superior court is reversed and the cause remanded.

REVERSED AND REMANDED.

MR. JUSTICE PAM DISSENTS.

STEPHEN ANDROCZYCYN, a minor,
by next friend, Plaintiff in Error,

vs.

SPAULDING & MERRICK, a cor-
poration, Defendant in Error.)

Error to

Circuit Court,

Cook County.

1941 A. 471

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, in December, 1910, when he was about twenty years old and employed by defendant, had a hand cut off by a revolving knife of a tobacco cutting machine at which he was working. He brought suit, alleging that the injury was caused through the negligence of his employer. Upon trial the jury returned a verdict of not guilty, and judgment was entered thereon, which plaintiff now seeks to have reversed.

The direct cause of the accident was the unexpected movement of the knife blade, and the crucial question concerns the cause of this movement. Plaintiff's claim is that without his knowledge the belt transmitting power to his machine became shifted from the loose or ineffective pulley to the tight pulley, so that when the power was turned on, the knife with which he was working unexpectedly revolved.

The testimony tended to show that just before the accident these things happened: Plaintiff shifted the belt on his machine from the tight to the loose pulley and stopped the revolving knife; he tightened the shifting device so as to hold the belt on the loose pulley; he changed the knife blade, replacing the dull one with a sharp one. At this juncture he was called to assist in putting into service an idle belt on a neighboring machine. At this time the power was off the overhead shaft, which

THE COURT IN REPLYING TO THE QUESTION OF THE COURT.

Plaintiff, in December, 1910, when he was about twenty
years old and employed by defendant, had a hand cut off by a re-
volving knife of a tobacco cutting machine at which he was working.
Plaintiff alleged that the injury was caused through the
negligence of his employer. Upon trial the jury returned a ver-
dict of not guilty, and judgment was entered thereon, which plain-
tiff now seeks to have reversed.

The direct cause of the accident was the unexpected
movement of the knife blade, and the crucial question concerns
the cause of this movement. Plaintiff's claim is that although
he knew the belt transmitting power to his machine became
loose from the loose or ineffective pulley to the tight pulley,
that when the power was turned on, the knife with which he was
working unexpectedly revolved.

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cident these things happened: Plaintiff pulled the belt on his
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tion of the knife; he tightened the shifting device so as to hold the belt
on the loose pulley; he changed the knife blade, replacing the
one with a sharp one. At this juncture he was called to
attend to putting into service an idle belt of a neighboring ma-
chine. At this time the power was off the overhead shaft, which

through belts served the various machines, and to put the idle belt into commission this shaft was turned slightly by pulling by hand on the belts. Plaintiff and another workman pulled down on the belt of plaintiff's machine. Then plaintiff resumed his work of tightening his new knife blade, his machine still being at rest. Almost immediately thereafter, as he says, the knife suddenly commenced to revolve, striking and severing his hand.

Plaintiff's theory is that in pulling down on the belt it in some way came partially off the loose pulley onto the tight pulley, so that when power was turned on the overhead shaft it was transmitted through the belt to the tight pulley, thus starting the machine.

The jury had for its consideration testimony, including that of plaintiff, that when the operation of pulling down on the belt was ended it was still wholly on the loose pulley; also that there was attached a mechanical device which would prevent the belt from slipping from one pulley to another except as operated and controlled by the plaintiff. There was also evidence as to the character of the revolving knife and arms, with special reference to size, shape and weight, and the fact that they could be revolved easily from a position of rest by a touch of the hand without the application of mechanical power. From these considerations and many other matters in evidence the jury might reasonably conclude that plaintiff had not made out a case of negligence on the part of the defendant. The jury could fairly infer from the conceded facts that plaintiff's own carelessness in handling the knife caused the injury. At least we cannot say that the verdict was manifestly wrong.

Complaint is made as to the rulings of the court in permitting the introduction of photographs in evidence. We do not think this was error. Whatever slight differences there may have been between the representations in the photographs and the exact

...at the time of the accident, were explained and pointed
...by witnesses. These facts distinguished the accident from
...the cause of the fire, but were not sufficient to establish
...an understanding of the physical reaction.

Very recent and reliable reports of the cause of the
...accident, and some of these objections are not without force,
...in cases involving different circumstances might lead to a
...conclusion. However, under the present facts of this case, about
...there is little controversy, we cannot consider irregularities
...and information in these instances to have sufficient
...the to cause a reversal. We do not discuss the criticism of
...the instructions, as this would allow the jury to draw conclusions
...and because of the testimony, which would
...is not necessary to answer.

The weight of the evidence is in favor of the
...hence and there being no reversible error in finding or instructing
...the judgment is affirmed.

ATTORNEYS.

DORA HOLTZMAN,
Defendant in Error,
vs.
LOUIS ISRAEL,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

194 I.A. 474

Plaintiff gave defendant \$400, as she says, upon his promise to return the money if he should not succeed in procuring the discharge of her husband and brother who were about to be tried upon a criminal charge. They were not discharged, and plaintiff brought suit for the return of the money and had judgment.

Alleged errors in the admission of testimony are not of sufficient importance to require a reversal.

AFFIRMED.

EDWIN PALM,
Defendant in Error,)

vs.)

JOHN JOHNSON and AXEL
JOHNSON, trading as John-
son Bros.,)
Plaintiffs in Error.)

Error to
Municipal Court
of Chicago.

194 I.A. 478

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendants to recover a balance claimed to be due him on certain contracts for painting and decorating buildings of the defendants. The amount claimed to be due in the statement of claim was \$376, and the court gave plaintiff judgment for this amount. This must be reversed and the cause remanded for a new trial, for the reason that the court apparently failed to take into consideration the undisputed evidence that plaintiff did not do all of the work he had contracted to do. Many closets and pantries, partitions, storage rooms, a porch and a ceiling failed to receive the painting or decorating which the contracts called for. One of the defendants testified that the cost of the work which the plaintiff failed to do was nearly \$200, while the plaintiff testified that it was very much less. We are unable to say which estimate, if either, should be accepted, but in any event the court should have made some allowance for the work not done and given defendants credit for same.

REVERSED AND REMANDED.

GEORGE J. WILLIAMS,
Defendant in Error,

vs.

EDWARD E. SHORT,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

194 I.A. 479

MR. PRESIDING JUSTICE MCCURELY DELIVERED THE OPINION OF THE COURT.

Defendant, Short, occupied an apartment belonging to the plaintiff, under a written lease which called for monthly installments of rent payable "each in advance, upon the first day of each and every month of said term." The December rent was not so paid, and plaintiff on December 3rd began an action in forcible detainer, on December 11th had judgment, and on December 28th recovered possession of the premises theretofore occupied by the defendant. Subsequently the premises were re-let to other parties, the rent commencing February 1st.

In the instant suit plaintiff seeks to recover from defendant the rental at the rate mentioned in the lease for the months of December and January, and the trial court gave him judgment therefor. Defendant says he is obligated only for the portion of December during which he occupied the premises, and for no more, and that it is unfair to dispossess him of the premises and yet make him pay rent for the time they were unoccupied. This depends on his contract, and we find that by clause in the lease numbered "seventh" and also by clause numbered "fourteenth" he has agreed to pay rent under the circumstances just described. The clauses are somewhat long and there is no need to quote them. The decision in Grommes v. St. Paul Trust Co., 147 Ill. 634, is precisely in point. In this opinion the court said (p.643):

"The lease provides, in substance, that a re-entry and taking of possession by the landlord shall not have the effect of determining the lease, nor operate to prevent its continuing in force. * * * There is nothing illegal or improper in an agreement, that the obligation of the tenant to pay all the rent to the end of the term shall remain notwithstanding there has been a re-entry for default; and, if the parties choose to make such an agreement, we see no reason why it should not be held to be valid as against both the tenant and his sureties."

The monthly rental is \$47.50, and the amount due for December and January is \$95.00; and plaintiff was entitled to judgment for this amount. For some reason which is not apparent the trial court entered judgment for \$100. Plaintiff was not entitled to more than \$95. If defendant in error will remit within ten days hereafter \$5 from the judgment it will be affirmed; otherwise it will be reversed and the cause remanded.

AFFIRMED UPON REMITTITUR; OTHERWISE REVERSED AND REMANDED.

EDWARD H. S. MARTIN,
Appellant,

vs.

CHICAGO, DULUTH & GEORGIAN
BAY TRANSIT COMPANY, a corp.
Appellee.

APPEAL FROM COUNTY COURT,

COOK COUNTY.

194 I.A. 480

MR. PRESIDING JUSTICE McSURELY

DELIVERED THE OPINION OF THE COURT.

Plaintiff purchased tickets from defendant for a round trip to Duluth on one of its steamships. He claims defendant breached its contract, and brought suit for damages. Upon trial the jury found the issues for the defendant.

The gist of plaintiff's claim is that in advertising matter issued by the defendant it was stated that the steamer would stop at Houghton, Michigan, for an hour, and that this stop was not made; also that the food was to be the best that could be purchased, prepared by the best chefs that could be employed, "masters of their art," etc., and that this undertaking was not achieved.

The alluring prospectus of defendant was not the contract of the parties. The ticket was the contract, as evidenced by the intention of the parties appearing on the face of the ticket. Cases in point are, Boylan v. Hot Springs Railroad Co., 132 U. S. 146; Yonessa v. Steamship Co., 153 Mass. 553; Quimby v. Boston & Maine Railroad Co., 150 Mass. 369; Charnhill v. Chicago & Alton Railroad Co., 67 Ill. 390. There is no provision in the contract for a stop at Houghton; and the only promise touching the food is in the words "meals and berth included." Construing this as an implied contract that the food should be fit for consumption,

the evidence wholly failed to prove that it was not fit, or that defendant refused to furnish wholesome food. The meals seem to have been about what one would expect upon a trip of this kind.

At the request of the defendant the court gave the following instruction:

"The court instructs the jury that unless you believe from a preponderance of the evidence that a contract was entered into between the plaintiff and defendant on the 26th day of July, 1913, and that the defendant failed to comply with the terms thereof, then your verdict must be for the defendant."

We think this was an inadvertence on the part of the court, as the instruction is clearly erroneous. If, as we have held, the ticket constituted the contract, it was made on the date it bears, namely, August 12, 1913, and not on July 26th, and the instruction seems to direct a verdict unless the jury find that a contract was made on July 26th. This mistake in the date probably occurred because plaintiff's declaration alleges that the contract was made on July 26th, but the allegation was made under a videlicet, and the date was immaterial. For the giving of this erroneous instruction we would be obliged to reverse were it not that upon the merits no other verdict could stand except the verdict returned. Under the evidence we must hold the giving of this instruction to be harmless error, and the judgment is affirmed.

AFFIRMED.

THE FOLLOWING REPORT WAS SUBMITTED TO THE BOARD OF DIRECTORS OF THE COMPANY ON THE 15TH DAY OF JANUARY, 1900.

THE BOARD OF DIRECTORS OF THE COMPANY HAS THE HONOR TO ACKNOWLEDGE THE RECEIPT OF THE ABOVE REPORT.

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D. H. GILBERT,
Defendant in Error,

vs.

THE CHICAGO & ALTON RAILROAD
COMPANY,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

194 I.A. 481

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is a fourth class contract action to recover damages arising out of the shipment of a carload of watermelons. The defendant filed an affidavit of defense, also a claim of set-off for freight charges amounting to \$115.68. Upon trial by the court the set-off was disallowed and judgment entered for plaintiff for \$150.

The case was submitted upon a stipulation of facts, which briefly are as follows: On July 1, 1909, plaintiff delivered to the Atlantic Coast Line Railroad Company at Thomasville, Georgia, a carload of watermelons of the value of \$150, consigned to D. H. Gilbert, Kansas City, Missouri, which car arrived at this destination over defendant's line at 10 P. M. Sunday, July 4th. It is stipulated that this was a reasonable time for transportation. Monday, July 5th, was a legal holiday and the local freight office of the defendant at Kansas City was closed on that day. The next day the Kansas City agent mailed a postal card notice of the arrival of the car, addressed to D. H. Gilbert, Kansas City, Missouri, the defendant having no knowledge of plaintiff's address other than that contained in the bill of lading. No answer to this notice was received. On July 8th another postal card notice was addressed

and mailed as before, but no reply to this was received. On July 12th the melons were sold by the defendant at Kansas City, \$18 net being realized. The temperature at this point from July 5th to July 12th ranged from 63 to 93 degrees.

The defendant having done all that it reasonably could to notify plaintiff of the arrival of the shipment was not guilty of negligence, and the bill of lading must govern. This provided that the carriers should not be liable for any damage or deterioration in value of the shipment due to detention at any point, where such detention was due to the consignor, the consignee, their agents or representatives. It was further provided that the carrier would have a right to dispose of the shipment in order to protect the interest of the owner and the charges of transportation, at any time while in transit or after tender of delivery, and that the carrier, acting as the agent of the owner, would not be responsible for more than the net proceeds of the sale. There was also a provision that any claim for damage should be made in writing to the agent at point of delivery, and that if a claim was not so presented no carrier should be liable. No claim on the shipment was presented until November 24th, when a claim for \$150, the value of the melons, was presented. The freight and demurrage charges were \$133.68. Crediting plaintiff with the net amount of the sale, \$18, leaves a balance, claimed by the defendant, of \$115.68.

The failure of plaintiff to receive the shipment was due either to his neglect to furnish the defendant with a proper address or his failure to respond to the notice sent him. Under the circumstances defendant was authorized to sell the shipment and to collect the freight charges.

The judgment of the lower court is reversed and judgment is entered in this court for the defendant against the plaintiff for the amount of defendant's set-off, namely, \$115.68.

REVERSED AND JUDGMENT FOR THE
DEFENDANT IN THIS COURT.

THE PEOPLE OF THE STATE)	
OF ILLINOIS,)	
Defendant in Error,)	
vs.)	Error to
)	Municipal Court
ERMINIE MONTGOMERY,)	of Chicago.
Plaintiff in Error.)	

194 I.A. 483

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant, Erminie Montgomery, seeks to have reversed a judgment against her in a proceeding charging her with unlawfully selling cocaine without the written prescription of a physician, contrary to the statute.

Her contention is that upon the trial the people did not prove that the sale was made "without the written prescription of a physician." In the case of City v. Montgomery, No. 20536, this court gave consideration to this same point, and we held that the burden was on the defendant to show that the sale was within the permissible exception. See opinion filed March 16, 1915, for citation of authorities. We are still of the opinion that this is the rule.

The sale of cocaine was clearly proven without the testimony and evidence to the admission of which objection is made; hence the errors, if any, in this regard would not justify a reversal.

The judgment is affirmed.

AFFIRMED.

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JULIA SHAUGHNESSY,
Appellant,

vs.

WILLIAM ROTHSCHILD et al.,
Appellees.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

194 I.A. 484

MR. PRESIDING JUSTICE McSULLY
DELIVERED THE OPINION OF THE COURT.

Complainant, Julia Shaughnessy, filed her bill seeking the release of a certain trust deed upon premises belonging to her, upon payment by her of \$300 and interest, the amount which she claimed remained unpaid of the mortgage debt. Louise C. Zweifel, the owner and holder of the notes and trust deed, filed her cross-bill asking for the foreclosure of the trust deed for the amount remaining unpaid, which she claims is \$1300 and interest. The difference of \$1000 in the respective claims is the controverted point in the case. The cause was tried in open court by the chancellor, who found the facts in controversy against the complainant and in favor of the cross-complainant, and a decree was entered dismissing complainant's bill for want of equity and finding that there was due to the cross-complainant for principal and interest, expenses and fees the sum of \$1666.00, and ordering that the property be sold. From this decree complainant has appealed.

Complainant, through the office of Watson & Bartlett, real estate dealers in Chicago, acquired title to the land described in the trust deed on March 21, 1901. On March 24, 1904, desiring to borrow money with which to build on the lot, she went to the office of Watson & Bartlett and was referred to one Arthur Luehr, a clerk in the office. Arrangements were made for a loan of

\$1700, and a principal note for that sum, dated May 24, 1904, due in five years, together with ten interest notes or coupons, were signed by her. In the notes it was provided that they should be payable at such place as the legal holder might from time to time appoint, and if no such appointment was made they were to be paid at the office of Watson & Bartlett in Chicago. Both principal and interest notes were made payable to the order of "myself" and were endorsed by the maker in blank. At the same time the trust deed in question was executed and delivered, which recited the indebtedness, the execution and delivery of the note, and conveyed the real estate therein described as security for the indebtedness to Oliver L. Watson as trustee. Arthur Luehr was designated as successor in trust.

Before the money on the building loan was entirely paid out Luehr left the employment of Watson & Bartlett and opened an office in another building in Chicago. Complainant followed him to his new office and transacted her business in connection with this loan with him. The money was paid out by Luehr from time to time as the building progressed, the last of it being paid to her on or about August 1, 1904.

On or about July 11, 1904, William Rothmann, an attorney of this city and one of the defendants herein, acting for his client, Louise G. Zweifel, paid Luehr the sum of \$1700 together with accrued interest, and received from him the said trust deed, principal and interest notes, together with an insurance policy, which papers he forwarded to his client, who resided in Wisconsin. Miss Zweifel has been the owner and has had possession of the paper since that time. From time to time as the interest notes matured she forwarded them to Mr. Rothmann for collection. Complainant from time to time as each successive installment of interest became due

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THE UNIVERSITY OF CHICAGO

paid the same to Luehr at his office, and Luehr remitted the money to Rothmann, and he in turn remitted it to his client. Rothmann testified that in each single instance the interest notes in question were retained by him in his possession until he had received the money therefor from Luehr.

Shortly before maturity of the principal note complainant received from Luehr a notice under date of April 29, 1909, to the effect that the principal note for \$1700, with interest, would be due and payable at his office on May 24, 1909. Pursuant to this notice complainant went to Luehr's office on or about May 24, 1909, and paid to him the sum of \$1400 to apply on the principal note, and also paid the interest note due that day. Neither the principal note nor interest note were in Luehr's possession, and no endorsement was made of the payment on the principal note. Neither Mr. Rothmann nor Miss Zweifel learned until about a year later that any money had been paid to Luehr on account of the principal, and then they were informed by him that complainant had paid the sum of \$400. Rothmann never knew until shortly after June 4, 1912, that complainant claimed to have paid Luehr \$1400 instead of the \$400 which Luehr had paid him.

At the time of the payment of the \$1400 to Luehr he gave to complainant a receipt for the same, stating that it was to apply on the principal note of \$1700 due May 24, 1909. He also gave her a receipt for the amount of the interest note, and at the same time prepared what purported to be an extension agreement, purporting to extend for two years the balance of \$300 which it was therein stated would remain unpaid on said principal note. This purported extension agreement recites that it is made between William Rothmann, "the owner and holder

[illegible]

of the note and trust deed hereinafter described," and the complainant. This alleged agreement bears the signature "William Rothmann by Arthur Luehr, his agent." The agreement was signed by the complainant. Neither Rothmann nor Miss Zweifel ever authorized Luehr to execute this instrument, and neither of them knew that such an instrument had been executed until it was produced in court and offered in evidence by the complainant.

About the date of this purported extension agreement Luehr stated to Rothmann that complainant had expected to have the money with which to take up the principal note at its maturity but had been disappointed, although she expected to have it within a short time, that she did not wish to have the time of payment of the note extended for a definite period but would like the privilege of taking it up when she should receive her money, and that she would pay interest at the rate of 7 per cent. until such time as she was ready to take up the note; and to this Rothmann on behalf of his client assented. About a year later Luehr informed Rothmann that complainant had paid the sum of \$400 to apply on the principal note but that she had not yet received the money which she had expected. Luehr paid Rothmann this \$400 and interest as agreed upon. He again stated that complainant did not wish an extension of the time of payment for a definite period but would like to be allowed to pay it as soon as she received her money, and asked that Rothmann consent to receive 6 per cent. upon the balance, and to this Rothmann assented.

About May 24, 1911, Luehr informed Rothmann that complainant desired to have the payment of the balance of the loan extended two or three years, to which Rothmann assented. Thereupon Luehr prepared in duplicate an extension agreement dated May 24, 1911, which was duly signed by Louise C. Zweifel

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THESE DOCUMENTS BELONG TO THE NATIONAL ARCHIVES

The following information was obtained from the records of the Bureau of Prisons, Washington, D.C., regarding the above-named individual:

NAME: [REDACTED]
DATE OF BIRTH: [REDACTED]
PLACE OF BIRTH: [REDACTED]
RACE: [REDACTED]
SEX: [REDACTED]
HEIGHT: [REDACTED]
WEIGHT: [REDACTED]
EYES: [REDACTED]
HAIR: [REDACTED]
SKIN: [REDACTED]
TATTOOS: [REDACTED]
SCARS: [REDACTED]
DISEASES: [REDACTED]
RELIGION: [REDACTED]
EDUCATION: [REDACTED]
OCCUPATION: [REDACTED]
MARRIAGE: [REDACTED]
CHILDREN: [REDACTED]
PARENTS: [REDACTED]
SIBLINGS: [REDACTED]
PREVIOUS RECORDS: [REDACTED]

[REDACTED]

THESE DOCUMENTS CONTAIN INFORMATION OF A CONFIDENTIAL NATURE AND ARE NOT TO BE RELEASED TO THE PUBLIC OR TO ANY OTHER PERSON OR ORGANIZATION WITHOUT THE EXPRESS WRITTEN PERMISSION OF THE NATIONAL AERONAUTICS AND SPACE ADMINISTRATION.

and the complainant. This agreement recites the execution and delivery of the principal note for \$1700 and the trust deed securing the same, each dated May 24, 1904; that said principal note has become due; that the sum of \$400 has been paid thereon, and that it is desired to renew the balance thereof for three years, and that the same is thereby extended to May 24, 1914, with interest at 6 per cent., interest for said extended period being evidenced by six interest notes of even date for the sum of \$39 each. There is a dispute as to the amount which these interest notes called for, but it is apparent from examining them that they called for \$39 each and were for that amount when executed by the complainant. This is the amount of interest at the rate agreed upon on \$1300. Rothmann testified that when they were paid he was in each instance paid the sum of \$39.

On October 10, 1911, Rothmann wrote complainant notifying her that he represented the holder of the principal and interest notes and that thereafter interest as well as the principal should be paid to him at his office. Complainant did not reply to this until about seven months later. In the meantime she had called upon Luehr and inquired as to the meaning of Rothmann's notice and was advised by Luehr to pay no attention to it but to continue to pay interest at his office, which she did.

Rothmann testified that the first time he had ever heard that the complainant claimed to have paid Luehr any money to apply on the principal other than the sum of \$400 was when she called at his office in response to a letter of June 4, 1912.

Watson, who was the trustee in the trust deed, testified that he was still doing business in the city of Chicago, had not been ill or away at any time, that no of-

fort had ever been made to pay him any part of the principal note of \$1700 described in the trust deed, and that in making loans his firm were loaning money of their clients.

Luehr was one of the defendants in the original bill but was never served, having apparently disappeared from Chicago, and at the beginning of the trial was dismissed.

This is not a case where a purchaser of notes and trust deed takes subject to any equities between the maker and the original owner. It does not appear that Luehr ever owned the note. It is perhaps uncertain who was the owner before it was purchased by Louise C. Zweifel, but it is a fair inference that it belonged to Watson & Bartlett or one of their clients. This fact distinguishes this case from Rapierski v. Simon, 198 Ill. 384, and McAuliffe v. Reuter, 166 Ill. 491. Complainant knew or should have known at the time she paid the \$1400 that Luehr was not the owner. In the document of extension which she signed at this time William Rothmann was described as "the owner and holder of the note and trust deed," and Luehr assumed to sign it as the agent for Rothmann. While Rothmann was only the representative of the real owner, this instrument should have put complainant on notice that Luehr was not the owner and that if she paid the money to him she did so at her own risk. Cases in point are Ortmeier v. Ivory, 206 Ill. 577, and Fortene v. Stockton, 182 Ill. 454.

By the extension agreement of May 24, 1911, and the execution by her of interest coupons calling for the payment of interest on a balance of \$1300, not \$300, complainant recognized that the amount paid on the principal note was \$400 and not \$1400. Under similar circumstances, in Gemkow v. Link, 225 Ill. 21, a decree of foreclosure was

sustained.

Where one of two innocent persons must suffer loss, the one whose negligent conduct made it possible for the loss to occur must bear it. Anderson v. Barne, 71 Ill. 20; Miller v. Larned, 103 Ill. 562. Complainant was negligent in making payments to Lushr in face of the knowledge which she should have had that he was not the owner of the notes and when he did not have them in his possession, and by their terms were not payable at his office.

The judgment is affirmed.

AFFIRMED.



ANNIE LIPSCHITZ,
Appellee,

vs.

CITY OF CHICAGO,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

194 I.A. 488

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff was injured by stepping through a rotten board in the sidewalk at the corner of Loomis and 14th streets in Chicago. Upon suit and trial she had judgment for \$4,000.

The verdict finding the defendant liable was justified by the evidence, and this seems to be conceded by counsel for the defendant. Errors which may have been made in admitting testimony are not of sufficient importance to require a reversal. The jury's conclusion as to plaintiff's knowledge of the defective condition of the walk, and the defendant's knowledge or duty to know, will not be disturbed.

The point most prominently urged concerns the extent of plaintiff's injuries. When she stepped through the hole in the sidewalk her right leg went through to a point about eight or nine inches above the knee, and became wedged in so tight as to necessitate the sawing away of the boards to extricate her. At the time she suffered a severe strain and jerk to the muscles and ligaments on the left side of her abdomen in addition to abrasions and contusions of the leg. At this time she was a married woman thirty years of age. The most serious result of the accident, as she claims, is a stricture of the left ureter, the small

The first part of the report deals with the general situation of the country. It is a very interesting and informative account of the state of the country at the time of the survey. The second part of the report deals with the results of the survey. It is a very detailed and accurate account of the results of the survey.

APPENDIX

The appendix contains a list of the names of the persons who were present at the meeting. It also contains a list of the names of the persons who were absent from the meeting. The appendix is a very useful and informative document.

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tube which connects the left kidney with the bladder, and a consequent atrophied condition of the left kidney rendering it incapable of performing its functions. The evidence tends to show that she subsequently became extremely nervous, which condition the doctor ascribes to the inability of one kidney to do all the work of elimination. Some time afterwards an operation was performed disclosing the stricture referred to and the shrunken condition of the left kidney. The physician testified that for this reason she will not be able to bear children. There was evidence tending to show the stricture was not present before the accident. There was also in evidence the contradictory opinions of physicians as to whether or not this accident could result in a stricture of the ureter. There was also testimony concerning pain and suffering experienced by the plaintiff. We cannot say that the conclusion of the jury as to the extent of the injuries was manifestly unreasonable under the evidence.

We see no reason to hold that the amount of the verdict is excessive.

It is claimed that because plaintiff is a married woman living with her husband that it was error to admit evidence of the value of medical services rendered her in connection with the injury, but in West Chicago Street R. R. Co. v. Carr, 170 Ill., 478, it was held that such evidence was competent as, among other reasons, under our statute, section 15, chapter 68, the expense of the family is a charge upon the property of both husband and wife, for which they may be sued jointly or severally. Medical attendance is a family expense within the meaning of the statute.

The judgment is affirmed.

AFFIRMED.

STRAWN FARMERS' ELEVATOR COMPANY,
a corporation,

Appellant#.

vs.

EDWARD F. MCKENNA et al.,

Appellees.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

194 I.A. 490

MR. PRESIDING JUSTICE McSweeney
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for a balance due for grain sold and delivered to defendants. Defendants filed a claim of set-off alleging a debit balance against plaintiff. Upon trial there was a verdict and judgment favorable to defendants.

Plaintiff is a corporation dealing in grain, whose principal place of business is at Strawn, Illinois, where it owns and operates an elevator. Defendants constituted a partnership engaged in the business of receiving and shipping grain, with offices in Chicago. The transactions between the parties began in February, 1908, and lasted about a year. There is no dispute over the items of sales from plaintiff to defendants appearing in plaintiff's statement of claim, showing a balance due from defendants of \$1,195.41.

The defense to this claim is that there were certain other transactions in which defendants, under orders from plaintiff, bought and sold grain for future delivery on the Chicago board of trade, which resulted not only in wiping out the balance due plaintiff but left plaintiff indebted to defendants in the sum of \$1,035.84.

The manager of the plaintiff was John W. Jordan, and these orders were given by him, apparently as the acts of the plaintiff, but plaintiff denies that Jordan was authorized

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to give such orders for it or that they were given with the knowledge or consent of its officers, but claims that they were the individual speculations of Jordan for which plaintiff cannot be held liable.

The authority of Jordan has already been considered in Strawn Farmers' Elevator Co. v. Bennett, 231 Ill. App. 428, and in Strawn Farmers' Elevator Co. v. West, 189 Ill. App. 213. In both of these cases petition for certiorari has been denied by the Supreme Court. Quoting from the opinion in the West case, it is "thus established that the mere fact that the manager, Jordan, sent these speculative orders to be executed on the Chicago Board of Trade in the name of the Strawn Company did not bind that company, and that such dealing did not come within the general scope of Jordan's employment or authority." What is said in these opinions, especially in the West case, disposes of almost all the points presented by counsel for the defendant. The opinion in the West case was rendered by this court, and what we there said which is applicable to the present case we re-affirm. The record before us is not substantially different from the record in either of the other cases.

It does not follow necessarily that an order to defendants to purchase 40,000 bushels of corn was sent on February 23, 1909, by plaintiff because, as claimed, Jordan left plaintiff's service on February 19, 1909. There is some uncertainty as to the date Jordan ceased to be employed. Further, it is a more reasonable inference from the evidence that this purchase was connected with prior transactions, particularly a sale of 20,000 bushels of May corn in December, 1908, and 20,000 bushels of May corn on February 3, 1909, and the right claimed by defendants to close out all deals

when margins were exhausted.

The case was tried under erroneous instructions submitting to the jury the question of the authority of Jordan under his contract. Under the prior decisions of this court and the evidence in the case plaintiff is not liable for orders for future delivery transmitted by Jordan.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

THE UNIVERSITY OF CHICAGO

PHILIP H. KATZ, M.D.

1910-1911

1912-1913

1914-1915

1916-1917

1918-1919

1920-1921

ALCAZAR AMUSEMENT COMPANY,
a corporation,

Plaintiff in Error,

vs.

PAUL PEREIRA,

Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

1941 A. 507

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

The written instrument set out in the statement of claim in this case begins with a recital that it is made between the plaintiff and Pereira Sextette and is signed by the plaintiff and by Paul Pereira. It cannot be held a contract of the parties to this suit because the defendant Paul Pereira is not named as a contracting party in the body of the instrument. Lancaster v. Roberts, 144 Ill. 213; Farless v. Farless, 176 Ill. App. 382. There is in the statement of claim a sufficient allegation of a verbal contract between plaintiff and defendant, Paul Pereira, wherein the defendant agreed with the plaintiff that the Pereira Sextette should perform at the theatre of the plaintiff for one week; that plaintiff should pay defendant therefor \$350, and further agreed to pay plaintiff as agreed or liquidated damages \$350 if the said Sextette should fail to appear and perform as agreed. The suit was by attachment; the defendant entered his appearance and moved that the attachment be quashed and the garnishee discharged, and the motion was granted. The defendant then moved that the suit be dismissed for want of jurisdiction and that motion was also granted, and a judgment for costs entered against the plaintiff. The grounds on which the attachment was quashed are not shown in the record.

The defendant having entered his appearance, the Court had jurisdiction to try both the issue in attachment and on the merits, if such issues were made, and the Court erred in dismissing the suit. We see no reason why the parties may not have agreed that the defendant should pay \$200 as liquidated damages in case the Lorraine Sextette failed to appear and perform at plaintiff's theatre.

The judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

830

ROBINA LEINDBACH,
Defendant in Error,

vs.

JOSEPH J. SCHAEFFER,
Plaintiff in Error.WRIT TO MUNICIPAL COURT
OF CHICAGO.

1941 A. 508

MR. JUSTICE PARKER DELIVERED THE OPINION OF THE COURT.

This writ of error brings before us for review a judgment of the Municipal Court for the plaintiff in an action of forcible detainer. Defendant Schaeffer was the lessee of the premises in question under a written lease for two years, which expired April 30, 1914. He remained in possession after the termination of the term, and May 7 the suit was brought in which the judgment was recovered. The only claim of a right in the defendant to remain in possession after the expiration of the term is based on an alleged statement of the plaintiff made before the expiration of the term, that defendant "had another year after the first of May."

A verbal agreement for a lease for a year to begin in futuro is void under the Statute of Frauds. The defendant held over after the expiration of the term, and this was on his part an offer to become a tenant on the terms of the former lease for another year; but the mere fact of the tenant holding over is not of itself sufficient to imply a tenancy from year to year. The landlord must in some manner recognize the tenancy by the acceptance of rent or otherwise. A tenant cannot by holding over and by refusing to surrender possession create a tenancy at will or at sufferance without the consent of the landlord express or implied.

There is in the record no evidence tending to show that the plaintiff recognized the defendant as a tenant from year to year by the acceptance of rent or otherwise, nor of any consent on her part to the creation of a tenancy at will or at sufferance.

The record is free from error, and the judgment is affirmed.

AFFIRMED.

There is no doubt as to the fact
 that the United States has been
 the only country in the world
 which has not been invaded by
 any foreign power since the
 Revolution.

THE UNITED STATES OF AMERICA
 WAS BORN IN 1776.

1776

EDWARD LEIN by ANNIE LEIN,
his next friend,
Defendant in Error,

vs.

CENTAUR MOTOR COMPANY OF
ILLINOIS, a corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

194 I.A. 509

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This suit was brought to recover \$500 which the plaintiff, Edward Lein, contends that he paid to defendant, the Centaur Motor Company of Illinois, as an advance payment on an automobile ordered by him December 15, 1913. The order was in writing, signed by the plaintiff, and was accepted by defendant in writing. By it plaintiff gave an order for an automobile, agreed to pay \$1230 therefor, and stated: "I enclose herewith the sum of \$500 as part payment thereon, and hereby agree to pay the balance of the purchase price when notified that said automobile is ready for delivery." In the statement of claim it was alleged that at the time said contract was entered into plaintiff was and still is a minor, and that he subsequently repudiated and disaffirmed the said contract. In his amended statement of claim plaintiff sets out the contract in full and again alleges that at the time the contract was entered into he was and still is a minor, and that he subsequently repudiated and disaffirmed said contract and demanded the return of said moneys so paid. In the amended affidavit of defense is the following: "Further, the defendant admits that the contract set forth in plaintiff's statement of claim as amended was executed substantially as set forth therein, but it shows that said car was

to be used by the plaintiff for the purpose of carrying passengers for hire; that the plaintiff intended to make this his business, and that the automobile was necessary for him in order to carry on such business, and that it was not to be used for pleasure or as a luxury. The Court directed a verdict for the plaintiff for \$500, and this writ of error is sued out to reverse the judgment entered on such verdict.

We think the contract is conclusive upon the question whether the \$500 was paid by the plaintiff. The contention that plaintiff cannot recover because the reason first given by him for repudiating the contract was that the defendant was not living up to its contract and that he then said nothing about being a minor, is without merit; so is the contention that the defendant is not liable because the plaintiff did not disaffirm within a reasonable time after becoming of age. The order was given December 15, 1913, and the suit brought March 27, 1914. The amended statement of claim, in which he averred that he still was a minor, was filed April 23, 1914, after this suit was brought. Both in the original and in the amended statement of claim he alleges that he was and still is a minor, and this is not traversed by the defendant in any of its affidavits of defense.

The fact alleged in the amended affidavit of defense, that plaintiff intended to use the automobile for the purpose of carrying passengers for hire, and that it was necessary for him to have the automobile to carry on such business, is not a defense to the action. It may be laid down as a primary requisite that all necessities must supply the personal needs of the infant, either those of his body, as food, clothing, lodging and the like, or those of his mind, as in-

struction suitable and requisite for the proper development of his intellectual powers. The doctrine of necessities manifestly is not to be extended to an infant's trading contracts. If an infant become a shop-keeper and buy goods and wares for the use of his shop, the contract is not binding. Schouler's Domestic Relations, sec. 412. If he borrow money, though he afterwards employ it for necessities, he is not liable to the lender; or even if it were loaned to him for the purpose of procuring necessities, for the lender ought to provide them. First Mol. 379 - 384 - 387; Grace v. Hale, 22 Humphrey, Tenn. 46. In Fyatt v. Smith, 165 Mass. 343, the plaintiff, a minor, bought of defendant a barber shop and chairs and divers other articles of furniture to be used in furnishing the barber shop, and repudiated his contract and brought suit to recover the money he had paid the defendant; and it was held that the articles purchased were not necessities, although the plaintiff was a minor and had no means of support except what he earned.

We think the Court properly directed a verdict for the plaintiff, and the judgment on the verdict is affirmed.

AFFIRMED.

THE UNIVERSITY OF CHICAGO PRESS
54 EAST LAKE STREET, CHICAGO, ILL. 60601
U.S.A. AND CANADA
OTHER COUNTRIES: 100 Brook Hill Drive, Secaucus, N.J. 07094
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U.S.A. AND CANADA
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LEHIGH VALLEY COAL SALES
COMPANY, a corporation,
Appellant,

vs.

OTTO RUECKEN, ADOLF RUECKEN
and MINNIE RUECKEN, as co-
partners, doing business as
William Ruecken & Company,
Appellees.

APPEAL FROM MUNICIPAL C.
OF CHICAGO.

194 I.A. 511

MR. JUSTICE BARNER DELIVERED THE OPINION OF THE COURT.

From 1902 to January, 1910, Adolf, Otto and Minnie Ruecken were copartners under the firm name of William Ruecken & Company, and during that time bought coal of the Lehigh Valley Coal Company. In January, 1910, the copartnership was dissolved by the written agreement of the parties, notice of such dissolution was given by publication in a newspaper, and the defendants contended that notice of such dissolution was mailed to the creditors of the firm, including the Lehigh Valley Coal Company, in September, 1910. It was agreed by the parties that Otto Ruecken should thereafter continue the business under the firm name. The Lehigh Valley Coal Company sold to the person or persons doing business as William Ruecken & Company in February, 1912, coal to the amount of \$943. About March 1, 1912, the plaintiff in error purchased the business and accounts of the Lehigh Valley Coal Company and became the owner of the demand for the coal so sold by the Lehigh Valley Coal Company in February, 1912, and sold and delivered coal in March and April, 1912, amounting to \$1254.61. These two demands together amount to \$2197.61, the amount this suit was brought to recover. Otto Ruecken was afterwards adjudged a bankrupt and the Lehigh Valley Coal Sales Company as plaintiff sought in this action to

recover the price of the coal so sold from Adolf and Winnie Kuecken. The jury found a verdict for the defendants, and this writ of error brings in review the judgment of the circuit entered on the verdict.

We think the Court properly instructed the jury that the plaintiff could not recover for coal sold by the plaintiff, the Lehigh Valley Coal Sales Company. That Company had no transactions or business dealings with the firm of William Kuecken & Company prior to the dissolution of that copartnership; after the dissolution the business was carried on by Otto Kuecken alone, and the defendants were not bound to notify plaintiff of the dissolution of the copartnership to avoid liability for the contracts made by Otto Kuecken after the dissolution.

Actual notice or its equivalent of the dissolution or the withdrawal of any member of a firm must be shown to protect the retiring member from liability for debts subsequently contracted in the name of the firm with persons with whom the copartnership had had dealings. The main issue submitted to the jury was whether the Lehigh Valley Coal Company received notice of the dissolution of the copartnership prior to the sale and delivery of the coal in question.

The evidence on the part of the defendants was that in September, 1910, a printed notice of the dissolution of the firm of William Kuecken & Company was enclosed in an envelope, stamped and placed in a United States mail box, addressed to the Lehigh Valley Coal Company; and the Court instructed the jury that if they believed that such notice was received by the Lehigh Valley Coal Company, they should find for the defendants; but that the burden of showing the receipt of such notice was on the defendants to show by a pre-

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ponderance of the evidence that the Lehigh Valley Coal Company received actual notice of the dissolution of the partnership existing between them and Otto Kuecken prior to January 8, 1910, and that "if the evidence on the question of whether such notice was actually received is equally balanced between the plaintiff and the defendants, or if it preponderates in favor of the plaintiff, the Court instructs you that the defendants have not shown that such notice was received by the Lehigh Valley Coal Company, and you must find in favor of the plaintiff that such notice was never received." The Court submitted to the jury the following interrogatory: "Did the Lehigh Valley Coal Company ever receive actual notice of the dissolution of the partnership existing between Adolf, Otto and Linnie Kuecken before the sale of the coal here in question?" and the answer was "Yes."

In Meyer v. Krohn, 114 Ill., 574, and Young v. Clapp, 147 Id., 178, it was held that proof of the mailing of notice of the dissolution of a partnership and of the retirement of certain members thereof, properly addressed to persons having had prior dealings with the firm, is prima facie evidence that the notices have been received by the parties to whom they were addressed; but such prima facie evidence may be rebutted by proof that they were not received.

The Lehigh Valley Coal Company, prior to July, 1910, had its Chicago general offices in the Western Union Building, 138 Jackson Boulevard, and in that month moved to the McCormick Building. The evidence shows that the Company received from 50 to 75 letters a day, and we think that a letter addressed to a corporation receiving that number of

letters per day, addressed to its former place of business, would be delivered to the corporation at its new place of business.

There is evidence in the record tending to show that Stroub, the manager and credit man of the Lehigh Valley Coal Company, called at the place of business of the person or persons doing business as William Kuecken & Company, and was told that Adolf Kuecken was in the real estate business and had been since he quit the coal business, and that Stroub asked how he was getting along.

We think that on the evidence in the record the question whether a notice of the dissolution of the copartnership of William Kuecken & Company and the withdrawal of Adolf and Minnie Kuecken was mailed to and received by the Lehigh Valley Coal Company in September, 1910, a year and longer before the purchase of the coal in question, was a question of fact for the jury, on which the verdict must be held conclusive. We think the record is free from reversible error, and the judgment is affirmed.

AFFIRMED.

A. J. SCHULTZ and A. F. SCHULTZ,
doing business as A. J. SCHULTZ
& SON,

Defendants in Error,

vs.

HERBERT DEERING,

Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

194 I.A. 513

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

In the statement of claim in this case it is alleged that plaintiffs' claim is for goods sold and delivered to defendant Deering at his special instance and request, as follows:

July 25, 1913,	2 - 2" gas valves at \$15.....	\$30.
Aug. 25,	3 - 1½" gas valves at \$10.....	30.
Oct. 4,	12 - 1½" gas valves at \$10.....	120.

Then follows the averment that the goods were by direction of the defendant shipped to A. J. Taylor, Cleveland, Ohio; that defendant Deering guaranteed to the plaintiff the prompt payment of the amount of said bills. The language of the statement is contradictory. A transaction cannot be both a sale and a guaranty, for a guaranty is a promise to answer for the payment of a debt or the performance of a duty by another who is himself in the first instance liable for said payment or performance.

We think that the proof shows a sale of the goods in question by plaintiffs to Deering, and not a sale to Taylor and a guaranty of payment by Deering. June 25, 1913, Deering ordered plaintiffs to ship certain valves to Taylor at Cleveland, and said in his written order, "I will guarantee prompt payment." But these goods were paid for, and we find no evidence of a guaranty by Deering of the payment by Taylor for goods shipped by plaintiffs to Taylor.

The evidence is conflicting. The testimony of plaintiff A. L. Schultz and of Jenczewsky, the patentee of the valves in question, is to the effect that defendant Deeming ordered the valves in question shipped to Taylor, and said that he was to pay for them; that he said that he was a partner with Taylor in the gas valve business; that he was financing the business and would pay the bills. Deeming testified that he told plaintiffs that he would pay the first bill and did so; that he was never a partner with Taylor in the gas valve business in the State of Ohio, and did not promise or guaranty to plaintiffs to pay for the valves involved in this suit.

The Court found the issues for the plaintiffs and assessed plaintiffs' damages at \$187 and entered judgment on the finding. We think that the finding was one which the Court might properly make from the evidence, and the judgment is affirmed.

AFFIRMED.

THE PEOPLE OF THE STATE
OF ILLINOIS,

Defendant in Error,

vs.

WILLIAM MORGAN,

Plaintiff in Error.

BRANCH TO MUNICIPAL COURT
OF CHICAGO.

194 I.A. 514

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted to reverse the conviction of plaintiff in error in the Municipal Court of the crime of petit larceny. The information charges that plaintiff in error stole "four dollars and fifty cents, good and lawful money of the United States of America, and one pocketbook of the value of fifty cents, all of the value of four dollars and fifty cents." The jury found the defendant guilty of larceny and that the value of the property stolen was \$4.10. The Court denied defendant's motion for a new trial and sentenced her to imprisonment for ten months and to pay a fine of \$25.00 and the costs, etc.

The contention of plaintiff in error is that there was no proper charge in the indictment of money, but only on the stealing of a pocketbook of the value of fifty cents, and that the sentence was excessive. So much of the information as charges the stealing of money is defective because there is in the information neither a description of the money charged to have been stolen nor allegation that the description was unknown to the prosecutrix. People v. Hunt, 281 Ill. 446.

The bill of exceptions has been stricken from the record. The jury found the value of the property stolen to be \$4.10. Conceding that the information is to be regarded as only charging the stealing of a pocketbook, the fact that

the value of the pocketbook was alleged to be fifty cents would not prevent the jury, on proper evidence, from finding that its value was \$4.10. Proof that the value of the property stolen is greater than is alleged in the indictment is not a variance, and the defendant cannot object that less was charged against her than was proved.

The punishment, within the limits prescribed by law, is a matter committed to the discretion of the trial judge.

We think the record is free from error, and the judgment is affirmed.

AFFIRMED.

CITY OF CHICAGO,
Defendant in Error,

v.

JOHN MORTONSMY,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

194 I.A. 515

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

Most of the questions involved in this case were considered and decided by us in City vs. Charles Montgomery, No. 40580, opinion filed March 9, 1915. That case was an action to recover a penalty for selling cocaine, and this is an action for a penalty for selling morphine otherwise than on the prescription of a duly registered physician. Both suits are for violations of the same section of the Municipal Code of Chicago, and most of the questions in both cases are identical. In that case it was contended, as it is in this, that the burden was on the City to prove that the cocaine or morphine sold by the defendant was sold without the written prescription of a registered physician, and we held that the burden of proof was on the defendant to prove that he had such prescription, and not on the City to prove that he had not.

It was also contended in that case, as it is in this, that the Court erred in not striking the statement of claim, and we held that it did not err because the cause belonged to the fifth class, in which no written pleadings are required.

In that case, as in this, the defendant cited and relied on People v. Ruston, 176 Ill. App. 203, and the distinction between the two cases was stated in the opinion.

We see no reason to change or modify the views

expressed in Chicago vs. Charles Montgomery, supra, and do not deem it necessary to restate the reasons nor cite the authorities in support of the views then expressed.

The plaintiff in error further contends that the Court erred in admitting the testimony of Officer Tucker, that Isadore Rubinsky stated in the presence of plaintiff in error that he got the morphine from plaintiff in error, and counsel cite and rely on People v. Harrison, 261 Ill. 517. To think that this case is to be distinguished from the case cited, Benjamin Rubinsky, a brother of Isadore, testified that he saw defendant hand Isadore a package, which he put in his pocket; that he went into the defendant's drug-store with Officer Tucker and found a package in Isadore's pocket; that Isadore was asked if he got the package in defendant's place, and answered that he did. Isadore Rubinsky testified that he asked defendant for a bottle of "New York" and defendant said he did not have it, but could give him "P. & W." and handed him a package, for which he paid defendant one dollar; that he also asked for a needle and cathartic pills and defendant gave them to him and he paid defendant therefor twenty cents. Kate Rubinsky, the wife of Isadore, testified that she saw Isadore go into defendant's drug store, saw defendant give her husband a bottle which Isadore put in his pocket, saw her husband give defendant some money, and that she got the needles and pills from her husband's pocket after they got home. When Isadore said, in the presence of the defendant, that he got the bottle from defendant, the latter said, "He did not get the morphine from me. I only sold him the needles." In the Harrison case it was said: "If the defendant is charged with crime and unequivocally denies it, and this is the whole conversation, it can not be introduced in evidence against him as an admission."

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The denial of defendant that he sold Isadore Rubinsky the morphine was not all of his statement. He admitted that he sold Rubinsky the needles and the evidence was that the needles and morphine were sold by defendant to Rubinsky at the same time. We think the testimony of Officer Tucker as to defendant's statement was properly admitted. The package found in Isadore Rubinsky's pocket contained morphine, and the evidence that defendant sold him the morphine, in violation of the ordinance, is clear.

The record is, in our opinion, free from error, and the judgment is affirmed.

AFFIRMED.

433 - 20765

JOHN F. JASPER,
Appellee,

vs.

GRIFFIN GRADU COMPANY,
a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

1941 A. 517

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This appeal brings before us for review a judgment for \$2,000 recovered by plaintiff Jasper against the Griffin Grad Company, defendant, for personal injuries alleged to have been sustained by reason of the negligence of defendant. The defendant operated a very large plant in Chicago, consisting of a number of large buildings used as foundries, machine shops, etc. Plaintiff worked for defendant as a carpenter and millwright in all of the buildings, making repairs and doing new work. The accident occurred in a foundry building two stories high, in which was a freight elevator running from the ground to the second floor, which was used to carry scrap iron to the second or charging floor. There was no person employed as conductor or who had special charge of the elevator. A "buggy" was loaded with scrap iron by an employe of the defendant, pushed onto the floor of the elevator car, and the man who brought the "buggy" to the elevator then got on the car, ran it up to the second floor, pushed his "buggy" off, unloaded it, pushed it back onto the car, ran the car down to the ground floor, and pushed his "buggy" off from the car. The elevator was operated by an endless cable passing over the sheaves, one at the bottom and the other at the top of the elevator shaft. A rope hung in the elevator shaft, by which the power could be shifted from a tight to a loose pulley and the car thereby stopped.

TABLE

1. The following table shows the results of the survey conducted in the year 1900, and is divided into two parts, the first showing the results of the survey of the general population, and the second showing the results of the survey of the population of the various districts.

2. The first part of the table shows the results of the survey of the general population, and is divided into two columns, the first showing the number of persons in each district, and the second showing the number of persons in each district who are of the age of 15 years and upwards.

3. The second part of the table shows the results of the survey of the population of the various districts, and is divided into two columns, the first showing the number of persons in each district, and the second showing the number of persons in each district who are of the age of 15 years and upwards.

4. The following table shows the results of the survey conducted in the year 1900, and is divided into two parts, the first showing the results of the survey of the general population, and the second showing the results of the survey of the population of the various districts.

5. The first part of the table shows the results of the survey of the general population, and is divided into two columns, the first showing the number of persons in each district, and the second showing the number of persons in each district who are of the age of 15 years and upwards.

6. The second part of the table shows the results of the survey of the population of the various districts, and is divided into two columns, the first showing the number of persons in each district, and the second showing the number of persons in each district who are of the age of 15 years and upwards.

The door to the elevator shaft was broken. This door opened automatically, coming down as the car went up and going up as the car came down. It ran between cleats which held it in place.

On the morning of the accident plaintiff's foreman, Curran, told him that the gate was broken and that he should go over and see what was the matter. Plaintiff did so, and reported to Curran that the gate was broken. Plaintiff testified that Curran said, "Go over and repair the gate," and that was all he said. Curran and Benson, a witness called by defendant, testified that plaintiff, in answer to a question by Curran as to what he had done as to making the necessary repairs so that the elevator could be put in service, said that he had tied it up temporarily; that he could not go further with it until such time as the elevator was shut down; that it was dangerous to go ahead and do anything with it; that he could not do anything further with it until the elevator was closed down in the evening; that Curran told plaintiff that was right, not to go further with it, to leave it just like that, and he said, "All right," and that was all that was said. Plaintiff at once got his tools, returned to the gate and began to do what was necessary to take out the gate so that it could be taken to the shop and repaired.

On this conflicting testimony it was for the jury to say what the facts were, and we cannot say that they might not properly adopt as true the testimony of the plaintiff supported, as it was, by the fact that he did not wait for evening, but at once began work on the gate. To take it out it was necessary to remove the bottom of the cleat. Plaintiff sawed it off four feet from the bottom, and to get it loose he had to go into the elevator shaft. He saw a man called

Frank coming with a "buggy" loaded with scrap iron, and waited until he came up and then said to him, "Frank, when you run this elevator up, don't run it down till I tell you to," or, "When you get this load up, don't run the elevator down until I tell you to," and stepped off from the elevator, and Frank went up with his load. After the car was part way up, plaintiff got under it and started to take out the cleat. He pulled at it with his pinch-bar and while doing so heard a rumbling noise over his head. He looked up, saw the elevator coming down, reached for the safety rope, could not find it, and the gates both being down, he laid down in the bottom of the pit and the car came down and struck him, inflicting the injuries for which he recovered.

The grounds of reversal are:

1. Plaintiff has failed to prove a cause of action.
2. Plaintiff has failed to prove that he did not assume the risk; on the contrary, on this record, plaintiff must be held to have assumed the risk.
3. Plaintiff was guilty of contributory negligence.
4. The trial court committed reversible error in the matter of instructions."

It is not contended by defendant that plaintiff and Frank were fellow servants, and clearly on the evidence they were not. When an elevator is operated by servants of a master as they have occasion to use it in the course of their employment, each of such servants when using it becomes pro hac vice its conductor, and for his negligence in the management of the elevator, if he is negligent, the master is liable. It is not disputed that plaintiff told Frank not to run the elevator down until he was out from under there, that Frank said "All right," and that, notwithstanding such request and acquiescence, Frank, without notice to plaintiff, lowered the car until it struck and injured plaintiff. We think that the

jury might properly find that this was negligence on the part of Frank, and that his negligence was the negligence of the defendant.

The negligence of the servant of the defendant in charge of the elevator in lowering the car after he had agreed not to lower it until he had been signalled to lower the same by the plaintiff, was not a risk which the plaintiff assumed by virtue of his contract of employment with the defendant, Guthman v. Chicago, 236 Ill., 9.

We think that the jury might from the evidence properly find that the plaintiff was not guilty of contributory negligence. The work that he was about to do in the elevator shaft would take but a few minutes. True, he might have placed timbers in the shaft, which would have made it impossible to lower the car down on him, or he might have thrown off the power and fastened the safety rope so that it could not be turned on; but in asking the man in charge of the elevator not to lower the car until he told him to, and securing his acquiescence, he did, we think, all that was reasonably required of him to do for his own safety, and cannot be held guilty of contributory negligence.

Instruction 3, given for the plaintiff, is as follows:

"You are instructed that what is meant by preponderance or greater weight of the evidence, is the preponderance or greater weight of the evidence which you believe; and if you do not believe any portion of the evidence, when considered together with the other evidence in the case, then that evidence which you do not believe need not be considered by you in determining where the weight of the preponderance lies."

We think this instruction is subject to serious objection. The jury have no right to refuse to consider any part of the evidence in determining where the weight or preponderance of the evidence lies, but it is their duty to de-

that the whole of the world is now in a state of
anarchy and confusion, and that the only way to
restore order is by the establishment of a
universal government.

The first step towards the establishment of a
universal government is the recognition of the
fact that the world is now in a state of
anarchy and confusion, and that the only way to
restore order is by the establishment of a
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The second step towards the establishment of a
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The third step towards the establishment of a
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The fourth step towards the establishment of a
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termine that question from a consideration of all the evidence. In a different case we might hold the giving of this instruction reversible error; but in this case we are not disposed to do so. We do not think that the Court erred in giving any of the other instructions given for the plaintiff.

The record is, in our opinion, free from reversible error, and the judgment is affirmed.

AFFIRMED.

LOTTIE E. FISH,
Defendant in Error,

vs.

WILLIAM H. FISH,
Plaintiff in Error.

SHROR TO CIRCUIT COURT
OF COOK COUNTY.

194 I.A. 521

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

July 5, 1910, a divorce was by the decree of the Circuit Court granted to defendant in error, Lottie E. Fish, from plaintiff in error, William H. Fish. The decree gave to the complainant the custody of the daughter of the parties and ordered that the defendant pay the complainant \$12 per month for the support and education of said child. The defendant has not paid any part of the money he was so ordered to pay. Complainant soon after the divorce went to live with her parents who resided at Washington, D. C., taking with her said child. March 9, 1913, she gave notice to the defendant that she would apply to the Circuit Court for a rule on him to show cause why he should not be attached for contempt for failure to comply with said order, and filed her petition for such rule, sworn to before a Notary Public in Washington, D. C., with a certificate of magistracy attached. No action was taken under said notice, and September 24, 1913, complainant gave defendant another notice similar in terms and filed a similar sworn petition, to which no certificate of magistracy was attached. A motion of defendant to dismiss the rule was denied and he then filed his answer to the rule. A hearing on the rule to show cause was had October 10, 1913, at which the defendant was present. The decree recites that the Court

having heard the evidence, found certain facts therein recited, found inter alia that there was due from defendant to complainant under said decree \$384, adjudged that the defendant was in contempt of the Court and decreed that he be arrested and placed in the common jail and there kept until he paid said sum of \$384 or was otherwise released by due process of law, but not to exceed a period of six months. From such order and decree the defendant prayed and was allowed an appeal and gave an appeal bond, but his appeal was not perfected and was afterwards dismissed by this Court with an order that procedendo issue. On filing a copy of the order the Sheriff attached the defendant and he then sued out this writ of error. It is said in the brief of plaintiff in error that this is a writ of error in a contempt proceeding, and this statement appears to be supported by the record, although from the recitals of the writ it is impossible to say whether the writ is sued out to reverse the decree of divorce, or the subsequent decree on the rule to show cause entered September 25, 1915.

Plaintiff in error assigns a great number of reasons why the order appealed from should be reversed. The petition for the rule states that an order that the defendant pay to complainant a certain sum of money each month for the support and maintenance of their child was made, and that the order was not complied with. This was sufficient to authorize the issuance of the rule. Shaffner v. Shaffner, 212 Ill. 492. It is apparent that the money was to be paid to complainant, and the order is not erroneous or void because it fails to state to whom the money is to be paid. Osler v. The People, 94 Ill. App. 285. The contempt charged was civil and the proceedings were properly begun and prosecuted in the cause in which the order was entered. Duke v. The People,

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

230 Ill. 174. In a civil contempt the sworn answer of the defendant is not sufficient to purge him of contempt, nor is it necessary to file interrogatories. Hake v. The People, *supra*; Leven v. Pakrney, 158 Ill. 159.

The findings of fact in the order and decree appealed from are sufficient to support the decree. The record states that the "Court having heard the evidence * * * doth find", etc., and it will be presumed, in the absence of a certificate of evidence that the evidence was sufficient to support the findings. The issuing of the writ or other process on which the defendant was arrested and confined is no part of the decree complained of and need not be considered. Marx v. The People, 234 Ill., 248. A discussion of the findings of the decree in detail would serve no useful purpose.

We think that on such findings the defendant was properly adjudged guilty of contempt and committed to the common jail therefor, and the decree is affirmed.

AFFIRMED.

HENRY A. VOSSLER,
Appellee,

vs.

GEORGE EARLE and WILLIAM
EARLE, co-partners as
GEO. & WM. EARLE,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

194 I.A. 522

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This appeal brings before us for review a judgment for \$6000 recovered by appellee Vossler against the appellants, George and William Earle, for commissions on the sale of real estate of appellants negotiated, it was alleged, by Vossler. The Earles lived in Chicago and were the owners of four tracts of land at Gary, Indiana, each containing forty acres, and Vossler was a real estate broker living and doing business at Gary. The contract for the sale of the real estate was made April 28, 1911, between the Earles as sellers and William R. Porter as buyer. Vossler found Porter, showed him the real estate of the defendants at Gary, told him who the owners were and, April 28, 1911, went with Porter to the office of the Earles in Chicago. There the Earles made an offer in writing to sell to Porter the four tracts of real estate above mentioned for \$120,000.00, and Porter in writing accepted the offer so made. October 7, 1911, the Earles entered into a contract in writing with William R. Porter and his father, T. R. Porter, in modification of the contract of sale entered into April 28, 1911, and November 18, 1911, entered into another contract with William R. Porter in writing in further modification of the contract of April 28, 1911, and the same day the Earles conveyed said real estate to William R. Porter.

We think that from the evidence the Court might properly find that there was a contract of employment of Vossler by the Barles, or at least that Vossler's services in negotiating a sale of the real estate to Porter were not rendered as a volunteer or against the wish and desire of the Barles, but that they knew that Vossler expected to receive compensation for his services if the land was sold to Porter, and that Vossler was encouraged by the Barles to aid in negotiating such sale and was led by them to believe that he would receive compensation in case of success; that the sale was effected through the efforts of Vossler and the Barles accepted the benefit of such efforts. By their conduct the Barles approved this agency of Vossler and a contract to pay him commissions was implied if the sale was thereafter consummated through his efforts. Rigdon v. Moore, 226 Ill. 382; Knotts v. L. E. & M. E. Ry. Co., 172 Ill. App. 550-555.

There is no evidence tending to show that Vossler was carrying on the business of a broker in Chicago, and the fact that he negotiated the sale to Porter did not make him a broker within the meaning of the Ordinance of the City of Chicago requiring a broker to have a license.

The sale in question was not negotiated in Indiana, but in Chicago, and the Indiana statute providing that no contract for the payment of commissions for the sale of real estate shall be valid unless in writing and signed by the owner, has no application. In our opinion, the finding and judgment of the Court is supported by the evidence, and the judgment is affirmed.

AFFIRMED.

PETER BILLOW,
Appellee,

vs.

ISAAC MILLER,
Appellant.

APPEAL FROM COUNTY COURT
OF COOK COUNTY.

194 I.A. 524

11. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

Appellant Miller made a contract in writing with Zimon June 17, 1913, by which Zimon agreed to erect a building and Miller to pay him \$700 therefor. June 26, Zimon made a contract with appellee Billow to do certain work on said building, for which Zimon agreed to pay him. The contention of Billow is that Miller also agreed to pay him for the work he agreed with Billow to do. To recover the price of the work done Billow brought suit in the County Court against Miller and Zimon. Miller defended but Zimon did not nor was he defaulted. The jury was sworn to try the issues against both defendants and returned a verdict against both, assessing plaintiff's damages at \$315. The record states that the defendants moved for a new trial, that their motion was denied and judgment rendered against the defendants; that the defendants prayed an appeal, which was allowed on the defendant filing a bond, etc. Miller gave the appeal bond, in which Zimon, his co-defendant, did not join.

There is no evidence tending to show a joint covenant or promise by Miller and Zimon, but on the contrary the evidence shows that the defendants were not jointly liable. Their contracts with Billow were separate, individual contracts. Fisher v. Spang, 43 Ill. App. 378. Because the judgment was against both defendants when they were not jointly liable, the judgment must be reversed.

Whether Miller promised to pay Billow is a

question on which the evidence is conflicting and on which we express no opinion.

The appeal was prayed and allowed to the defendants jointly, and the only appeal bond filed was the separate bond of one defendant alone, and the appeal would have been dismissed on motion of the appellee if such motion had been made. Ellison T. Hammond, 189 Ill. 470.

It was irregular to try the issues against both defendants when Simon had not appeared. In such case the default of the defendant who fails to appear should be entered and the jury sworn to try the issues joined between the plaintiff and the defendant who has pleaded, and to assess damages against the defendant in default.

Judgment reversed and cause remanded.

REVERSED AND REMANDED.



the following is a list of the names of the persons who have been
admitted to the office of the Secretary of the Board of Education
since the last meeting of the Board, and the date of their admission.
The names are given in alphabetical order, and the date of admission
is given in parentheses. The names of the persons who have been
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the office of the Secretary of the Board of Education since the last
meeting of the Board, and the date of their admission, are given in
alphabetical order, and the date of admission is given in parentheses.

BERNESTINE HAPP,
Appellee,

vs.

WILLIAM HAPP,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

194 I.A. 525

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, William Happ, from a decree of divorce entered in the Superior Court on the bill as amended of Bernestine Happ. The cause was tried to a jury. The Court instructed the jury to find the issues for the complainant and on the verdict an directed entered the decree. The ground of divorce relied on by complainant was that the defendant had committed adultery with Katherine E. Dean, between October 7 and December 22, 1913.

The first ground of reversal urged is that the Court erred in denying defendant's motion for a continuance. The defendant, in order to have that question reviewed in this Court, should have made the affidavit for continuance a part of the record by the certificate of the Judge who heard the cause. This was not done. The clerk copied into the transcript the affidavit, but this did not make it a part of the record. DeQuoin Water Works v. Parks, 307 Ill. 46.

Appellant contends that the pleadings present three issues: First, whether complainant was a resident of the State of Illinois when she filed her bill; the second, the adultery of the defendant, and, third, the adultery of the complainant. The testimony of the complainant, of her children and of others who were in her service and members of her household, is that the complainant resided in Chicago at and for some time before the filing of the bill and from that

time until the hearing of the cause. Complainant testified that she came to Chicago before she filed her bill with the intention of remaining and continuing to reside here and had since resided here. She bought a house in Chicago and occupied the same with her children and the other members of her household. As against this testimony the defendant introduced no evidence of any tangible fact tending to show that complainant was not an actual and bona fide resident of Chicago when she filed her bill and from that time until the time of the hearing. In our opinion the Chancellor properly instructed the jury that the complainant was a resident of the State of Illinois at and before the filing of her bill.

The evidence of the adultery of the defendant was clear and convincing, was not controverted, and the Court was not required to submit that question to the jury.

Appellant concedes that there was no evidence that should have been submitted to the jury on the issue of complainant's adultery, but contends that the Court erred in excluding evidence offered by the defendant on that issue. This contention is based in part on the refusal of the Court to require complainant to testify to the date of her marriage to Paul Schuman, which, it is claimed, occurred in December, 1893, for the purpose of showing that illicit relations existed between her and the said husband prior to said marriage. In this the Court did not err. Evidence of incontinence with another person occurring twenty years before the adultery alleged in the answer, would not tend to prove the adultery charged. Earl v. Earl, 81 N. J. Eq. 444; Realf v. Realf, 77 Pa. S. 31.

It is not claimed that the witness Pumphreys heard or saw anything tending to show that complainant and

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Baldwin were guilty of acts of adultery, but only that he heard her talk to Baldwin, and it is contended that such evidence, together with evidence as to her acquaintance with McKenna and other evidence, would have been very strong evidence to be submitted to the jury in support of the recriminatory defence. It is not claimed that any of the witnesses saw any act of indecent familiarity on the part of complainant. Counsel for appellant, as has been said, does not claim that there is in the record evidence that should have been submitted to the jury on the issue of complainant's adultery. The limit practically to circumstantial evidence is that it must be sufficiently significant in character and sufficiently near in point of time, to have a tendency "to lead the guarded discretion of a reasonable man" to a belief in a material element in the fact to be proved. If too remote or insignificant it will be rejected. Thayer v. Thayer, 101 Mass. 111. The facts sought to be elicited by the questions to which objections were sustained, were too insignificant to have any probative value, and the Court properly sustained the objections.

To find in the record no evidence tending to warrant or support a different verdict from the one directed by the Court, and the Court therefore properly instructed the jury to find the issue for the complainant.

The decree of the Superior Court is affirmed.

AFFIRMED.

KENNEDY FURNITURE CO.,
a corporation,

Defendant in Error,

vs.

MRS. WILLIAM GRIFFIN,

Plaintiff in Error.

ERROR TO THE MUNICIPAL
COURT OF CHICAGO.

194 I.A. 530

MR. JUSTICE HOLDS DELIVERED THE OPINION OF THE COURT.

One George Fabian bought of defendant in error certain household furniture upon what is known as the instalment plan, Fabian giving his note for \$150.30, payable in instalments, which it is contended is secured by the chattel mortgage found in the record, on the household furniture so purchased. The note was signed by Fabian in person. The chattel mortgage was executed and acknowledged on behalf of Fabian by E. W. Fishell, his attorney in fact, on a power of attorney from Fabian empowering him so to do. The chattel mortgage so executed was duly recorded in the Recorder's Office of Cook County, and thereafter Fabian sold a portion of said household goods to plaintiff in error, Mrs. William Griffin, against whom defendant in error brought this suit in replevin and from whom it took the goods for non-payment of a portion of said note.

On a trial before the Municipal Court with a jury, the court, on motion of defendant in error, instructed the jury to find a verdict in its favor with one cent damages, upon which verdict, after overruling motions in arrest of judgment and for a new trial, judgment was entered.

To the receiving of the chattel mortgage in evidence plaintiff in error objected, but it was admitted in evidence over her objection and also a motion made at the

close of the proers to strike it from the record upon the ground that the mortgage could not legally be acknowledged by an attorney in fact.

Among the errors assigned for a reversal are, that the court erred in admitting as evidence the chattel mortgage and also in directing the verdict in favor of defendant in error.

In the Chattel Mortgage Act, Section 3, Chapter 95, R. S., it is provided that a chattel mortgage must be acknowledged by the mortgagor. As a chattel mortgage is the creature of the statute, and its provisions are contrary to the course of the common law, it is axiomatic that it must be strictly construed against those seeking to enforce its provisions.

There is no dispute in this record but that the plaintiff in error was a bona fide purchaser for a valuable consideration. The question, therefore, necessary for our decision is the binding force of the chattel mortgage as to third parties. While it might be conceded to be good as between the immediate parties, a different question arises when it is sought to enforce it against a third party, an innocent purchaser for value.

No case in our Supreme Court has been cited to us by counsel on either side touching the validity of the execution and acknowledgment of a chattel mortgage by an attorney in fact of the mortgagor; but an examination by us discloses the case of Kimball v. Polakow, 190 Ill. App. 174, in which it is held by this Court that "a chattel mortgage not acknowledged and recorded as prescribed by the statute is invalid as to third persons, although it may be effective between the parties to it." And it is further said in that

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opinion: "We find no provision in the Chattel Mortgage Act, chapter 98, R. S. (J. & J. 7576 et seq.), authorizing or empowering any attorney in fact to do any of the things required of the owner by the act to make a valid chattel mortgage; nor do we find any authority conferred on the owner to acknowledge a chattel mortgage by his attorney in fact."

While the Kimball case is in conflict with the earlier case of Cook v. Harrison, 18 Ill. App. 402, we find that it has been affirmed on further review by the Supreme Court, and is reported in 268 Ill. 344 (Advance Sheets), which makes it the law of the forum.

The Supreme Court holds in the Kimball case, supra, that a chattel mortgage not executed, acknowledged and recorded as provided by the statute, is invalid as to those not parties or privies to it, and that "there is no provision in the statute authorizing the acknowledgment to be made under power of attorney." The Court further holds that a purchaser from the mortgagor has a right to defend on the ground of the invalidity of the mortgage as to such purchaser, even if good as between the parties to it.

We therefore hold that the municipal court erred in admitting in evidence the chattel mortgage of Fabian, executed and acknowledged as it was by his attorney in fact, and likewise in instructing the jury to find a verdict in favor of the defendant in error. As the chattel mortgage in question conferred no right upon defendant in error to take the mortgaged property from the plaintiff in error, a bona fide purchaser for value, the judgment of the municipal court is reversed, but the cause is not remanded.

REVERSED.

476 -- 19879.

JOHN McKECHNEY and JOHN
McKECHNEY, JR., as sur-
viving partners of the
firm of WEIR, McKECHNEY
& CO.,

Appellants,

vs.

CITY OF CHICAGO,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

194 I.A. 539

MR. JUSTICE HOLCOM DELIVERED THE OPINION OF THE COURT.

The litigation involved in this appeal fully appears
in the cases of

City v. McKechney, 91 Ill. App. 442.

City v. McKechney, 208 Ill. 372.

McKechney v. City, 160 Ill. App. 544.

The Supreme Court denied a writ of certiorari in the last cited
case, making that decision final of the matters involved in
that case, in which three separate actions were consolidated.

The bill involved in this appeal is one brought by
appellants against the appellee municipality to vacate and set
aside a judgment for one dollar and costs in favor of appellant
and for a new trial on the ground that such judgment was ob-
tained and the balance of the claim of appellant defeated by
the fraud and perjured evidence of appellee's witnesses. To
this bill appellees interposed a general demurrer, which was
sustained and the bill dismissed for want of equity and
appellants appeal.

As some dates of events are material to a proper

understanding of our decision, we will recite them. The date of the verdict in the three consolidated cases was January 25, 1907. Motion for a new trial was overruled and judgment entered upon the verdict March 2, 1907. The writ of error sued out by appellants from this court on that judgment was decided and the judgment of the Circuit Court affirmed April 7, 1911 (160 Ill. App. 544), the Supreme Court denying appellants a writ of certiorari thereon June 9, 1911.

The bill avers that the fraud and perjury relied upon as warranting the court in vacating the judgment and granting a new trial came to the knowledge of appellants in November, 1909, through certain testimony given before the "Merriam Commission" by the City Engineer and others who had testified for the city on the trial of the three consolidated cases. The bill in this case was not filed until June 7, 1912, more than two years and a half after appellants admittedly by their bill had full knowledge of the frauds and perjuries about which they complain, and no reason is given in explanation of the laches thus imputable to them.

We are satisfied that the learned chancellor was right in sustaining the general demurrer to the bill, if for no other reason than the laches of appellants in not proceeding with reasonable diligence to institute their suit after gaining knowledge of the facts upon which they rest their claim to relief. It is well settled that laches appearing upon the face of a bill may be advantaged of by a demurrer, either general or special. In Coolidge v. Rhodes, 199 Ill. 24, and again in French v. Thomas, 252 Ill. 65, it was held that a bill to impeach a judgment for fraud must be brought within the time

investigation of the building, and will verify them. The

date of the building in the House records is 1871 and

January 14, 1871. It is a two story building and

contains several rooms for various purposes. The total

area is about 10,000 square feet. It is situated on the

corner of the block and is the largest building in the

block. It is a two story building and contains several

rooms for various purposes. The total area is about

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total area is about 10,000 square feet. It is situated on

allowed for suing out a writ of error, a time which had long passed when the bill before us was filed. A failure to proceed with diligence will not be excused, except for the most cogent and imperative reasons clearly appearing from averments of fact in the bill. Nor will a bill be entertained after the lapsing of the time allowed by the statute for suing out a writ of error. *Allison v. Drake*, 145 Ill. 600.

The case of *Exchange National Bank v. Darrow*, 177 Ill. 362, is similar in fact and principle to this case. The *Darrow* case supra was a bill seeking a new trial on newly discovered evidence. The newly discovered evidence was known in December, 1892, and the bill was not filed until March, 1896. A general demurrer filed to the bill was sustained on the ground of laches, the court holding that due diligence required that the bill be filed promptly after discovery of the new evidence, and also a diligent search for evidence in contemplation of presenting such bill. An averment that the new evidence was not known until after the affirmance of the judgment in the Supreme Court was held unavailing to excuse a delay of more than three years. The court said, "We cannot, by the strict rules of equity governing cases of this nature, excuse such delays and thereby relieve appellants from the consequences of their laches *** and if injustice has been done it must be attributed to its own inattention."

We have examined with care all of the cases cited for appellants in which new trials were granted on bills in the nature of the one at bar, and in none of them do we find that laches was attributable to the party seeking relief, but on the other hand reasonable diligence was made to appear to have been exercised in each case. Appellants fail to show diligence,

either before or at the trial, by any effort made to procure testimony to overcome that of appellee's witnesses, claimed in the bill to have been false. No attempt was made to reach any of the workmen engaged in boring the tunnel or any engineer or city official having knowledge of the work and the composition of the soil through which the tunnel was bored. It is not enough to disclaim knowledge, but facts must be averred demonstrating that reasonable efforts were put forth to obtain the information, which efforts proved abortive. No such averment of facts is found in this bill. It is idle to contend that the condition of the tunnel and the character of the soil could not have been discovered by the exercise of reasonable diligence and ordinary common sense. The main controversy was as to the character and kind of soil excavated to make the tunnel. This information could have been ascertained from persons engaged in these operations. It is clear that the tunnel did not dig itself - that it took engineers, mechanics, laborers and machinery co-ordinating to bring about its final construction.

It is likewise evident that there were many persons who could have been procured to furnish exact information upon these conditions if a reasonable effort had been made in that direction. That appellants could not at any time obtain access to the tunnel is a conclusion founded on no particular averment of fact supporting such conclusion. At the trial the process of the court was at the service of appellants to bring in documentary evidence and such other witnesses as they may have needed to either make their original case or in rebuttal to overcome the claimed untruthful testimony of appellee's witnesses, but no effort as to do was made. Any officer of

the city could have been reached by the court's process and compelled to testify to the facts on behalf of appellants, but no effort in this regard was made. That the material excavated for the tunnel bore must have been brought to the surface is self evident, and that it could have been made available for examination by appellants is not to be denied, and it is likewise clear that an examination by any competent person would have disclosed its character, nature and component parts. No effort in this regard was made by, for or in behalf of appellants.

While what has already been said effectually disposes of this appeal, still we will advert briefly to the question of the materiality of the matters set forth as newly discovered evidence and false testimony, so far as they have any bearing upon the right of appellants to invoke the aid of a court of equity to set aside the judgment and grant a new trial.

It is a well settled principal of law that a judgment obtained by perjury of the successful party or his witnesses at the trial is no sufficient ground for either vacating the judgment or enjoining its enforcement. *United States v. Throckmorton*, 98 U. S. 65, seems to be the leading case on this subject, and it has been followed in this state. *Pratt v. Griffin*, 225 Ill. 349, *Lancaster v. Springer*, 136 Ill. App. 140, *Adamski v. Wiczorek*, 93 Ibid 357.

The rule is that the acts for which a court of equity will, on account of fraud, set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds extrinsic or collateral to the matter tried by the trial court, and not to a fraud in a matter on which the decree or judgment was rendered. Extrinsic or collateral fraud is defined as consisting of such

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acts as keeping the unsuccessful party away from the court by a false promise of compromise, or purposely keeping him in ignorance of the suit; or where an attorney fraudulently pretends to represent a party and connives at his defeat, or, being regularly employed, corruptly sells out his client's interests, and such fraudulent acts in fact prevent the unsuccessful party from having a trial; but when he has a trial he must be prepared to meet and expose perjury at that trial.

In the Throckmorton case 1897, Mr. Justice Miller, in delivering the opinion of the court, said, among other things: "There are no maxims of the law more firmly established or of more value in the administration of justice than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy, namely, interest rei publice, ut sit finis litium and nemo debet bis vexari pro una et eadem causa." These maxims, rendered in the vernacular, may be read, "It concerns the commonwealth that there be an end to law suits. The general welfare requires that litigation be not interminable," and "It is a rule of law that a man shall not be twice vexed for one and the same cause." These are sound and useful maxims, pertinent to the settlement of this litigation, and are to be invoked accordingly. The fraud alleged in the bill is "intrinsic fraud" and is confined to matters given in evidence upon the trial of the causes in which a new trial is sought. This is not the character of fraud against which equity affords the relief prayed in the bill found in this record.

The judgment of the Circuit Court sustaining the demurrer interposed by appellees to the bill of appellants and

dismissing the same for want of equity, being in consonance with the law, is affirmed.

AFFIRMED.



ACME-EVANS COMPANY, a
corporation,
Defendant in Error,

vs.

OSCAR L. HUNTER and JOHN BOB,
doing business as O. L. HUNTER
& COMPANY,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

1941 A. 542

MR. JUSTICE HOLDS DELIVERED THE OPINION OF THE COURT.

This is an action seeking to recover damages suffered by plaintiff through the breaching by defendants of a written contract made by them with plaintiff for the sale of 20 tons of "bran" and 20 tons of "middlings." The terms of the sale were for "prompt delivery" upon shipping instructions to be furnished by defendants to plaintiff. The controlling questions for solution are two: (1) Was the contract breached by defendants? and (2) Were the proofs of plaintiff of the market price of these commodities at the time of resale for account of defendants, sufficient in point of law? The amount of the judgment is the difference between the contract price and the amount realized by plaintiff on the resale, with carrying charges and commissions added.

The only countervailing proof offered by defendants rested in letters and telegrams received by them from plaintiff, which, so far from weakening the case already made by plaintiff, tended, in our opinion, materially to strengthen it.

The evidence sustains the contention that defendants breached their contract, which was for "prompt shipment."

Prompt delivery by legal intendant means, at the most, within a few days. The contract also contained a provision that "At the end of the contract time * * the seller shall have the right * * (3) to continue the contract, without notice, for thirty days with a carrying charge. * * " It will be noticed that the option, which is in effect to extend the time of delivery, was reserved to the plaintiff, and although the resale was not made until more than 30 days after the lapse of a reasonable time in which defendants had to give shipping instructions, still, during all that time, the letters and telegrams in evidence show, plaintiff was pressing defendants for such shipping instructions. To all requests for such instructions defendants gave no heed. It is plain from this undisputed evidence that defendants could not have been led into believing, as they claim they were, that the time of performance had been extended.

We hold that the contract in evidence was, in its essence, executory, and therefore the law did not require notice to defendants of a resale.

Complaint is made by defendants that trade journals and market reports are secondary evidence and should not have been received as evidence tending to establish market value. With this contention we are unable to agree. The rule on this subject is well stated in Winson v. Ry. Co., 14 Mich. 496, in which in an opinion by Judge Cooley it is said:

"Evidence of the state of the markets as derived from the market reports in the newspapers should not have been excluded. * * * The principle which supports these cases will allow the market reports of such newspapers as the commercial world rely upon to be given in evidence. As a matter of fact, such reports, which are based upon a general survey of the whole market and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries or individual sales or enquiries; and courts would justly be subject to ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character."

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The force of this reasoning is accentuated in the light of the evidence of plaintiff's witness Woodward, (R. F. 60) where he said in substance that the information from which he derived his judgment was the class of information upon which the trade generally is accustomed to rely; that the Western Feed Market Bureau is a daily feed report published in Milwaukee, which costs \$5 a month, and is recognized among the milling fraternities as one of the best reports that can be had, and that these bureau reports are considered absolutely reliable by the trade and are used very generally.

However, were these market reports at fault and did not state the correct market price, it was open to the defendants to show that fact by countervailing proof, which they made no attempt to do.

Finding no reversible error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

The first of the two papers is a letter from the
 author to the editor of the "New York Times", dated
 June 10, 1894, in which he expresses his regret
 that he cannot give more space to the subject of
 the "New York Times" and his hope that the
 paper will be able to do so in the future.
 The second paper is a letter from the editor of the
 "New York Times" to the author, dated June 10, 1894,
 in which he expresses his regret that he cannot
 give more space to the subject of the "New York
 Times" and his hope that the paper will be able
 to do so in the future.

CHARLES H. COMMONS,
Appellant,

vs.

TAYLOR A. SNOW,
Appellee.

ALFRED. FROM MUNICIPAL COURT
OF CHICAGO.

194 I.A. 569

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

The parties to this litigation were each partners in two firms, viz: Taylor A. Snow & Company and the Co-operative Home Purchasing Society. Snow succeeded to the assets and business of the former firm and Commons to those of the latter. At the time of the dissolution of both these firms the articles of dissolution contained a clause substantially as follows: All business relations between said partners have been duly settled and each is discharged from liability to the other by the execution of this certificate in duplicate by the respective parties.

Subsequent to the dissolution of these two firms the parties to this litigation had some dealings concerning certain real estate, the details of which are unimportant to either an understanding or decision of this case, and following such transactions and on August 4, 1910, appellant executed and delivered to appellee a release in general terms under seal, to which was added, as the final clause, these words: "It is further agreed by me that all property now in the possession of said Taylor A. Snow, both personal and real, of the firm of Taylor A. Snow & Company, or belonging to him individually of record or otherwise, at this date shall remain and be his undisputed personal estate. It is further agreed that the dissolution agreement dated October 29, 1908, of the firm of Taylor A. Snow & Company and that of the Co-operative Home Purchasing

THE UNIVERSITY OF CHICAGO

LIBRARY

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THE UNIVERSITY OF CHICAGO LIBRARY

The University of Chicago Library is a major research library in the United States. It is one of the largest and most comprehensive libraries in the world, with a collection of over 10 million volumes. The library is located on the campus of the University of Chicago in Chicago, Illinois. It is a member of the Association of Research Libraries (ARL) and the Association of American Universities (AAU). The library is open to the public and is a valuable resource for students, faculty, and researchers. It is also a center for the study of the history and development of libraries. The library is a part of the University of Chicago and is managed by the University of Chicago Library Board. The library is a major source of information and knowledge for the University of Chicago and the world.

Society, dated October 1, 1906, shall remain in full force and effect." Plaintiff's claim is for \$3790.54, which plaintiff testified that the Huberer & Snow Company, the predecessor of Taylor A. Snow & Company, borrowed from the Co-operative Home Purchasing Society in 1906. The cause went to trial before court and jury and on motion of defendant at the close of all the proofs the court instructed a verdict for defendant, upon which a judgment of nil capiat was entered and plaintiff prosecutes this appeal.

If the judgment of the trial Court can be sustained, two points are presented for consideration and must be decided in the affirmative.

FIRST: Was the direction of the Court to the jury, to find a verdict for defendant, without error?

SECOND: Could the plaintiff maintain his action against defendant?

We will dispose of the last proposition first.

The parties were each partners in the two dissolved firms. The cause of action rests in the claim of one firm against the other, in each of which firms both parties were partners. Plaintiff being the sole surviving member of his firm after the dissolution, sues in his own name the defendant as the sole surviving member of defendant's firm after its dissolution. Notwithstanding the dissolutions the firms remained the same, with the difference only of a diminished membership.

George v. Pfeil, 158 Ill. App. 261, in which the ruling of the trial court was sustained, presents cogently the law decisive of this point in the following proposition held as law by the trial Judge, viz: "The Court holds as matter of law, that one partner cannot maintain an action at law against his copartner, either in an original suit or by way of set off, upon

any transaction relating to the partnership business, unless and until there has been a final accounting and settlement of all the partnership matters, a balance is struck and a promise to pay such balance." None of these essential and indispensable elements are here present. There is no pretense of any promise to pay this particular sum or any other sum and no accounting or settlement made in which any claim was put forward for the particular amount in controversy.

The decided weight of authority is to the effect and purport that there must be not only a final settlement and balance struck, but an express promise to pay, before an action can be maintained. So far from there being any such elements here, plaintiff grounds his claim on the contention that the former firm of Haberer & Snow Company borrowed the amount demanded from the Co-Operative Home Purchasing Society, and that defendant's liability rests in his assumption to pay the debts of the former firm by his agreement made at the time Haberer retired from it.

It may not be amiss here to say that the record is barren of any evidence that the money was borrowed as alleged. If it can be said that the debt existed at the time of the firm's dissolution, it will be presumed as matter of law that there was an adjustment of the accounts and that all accounts were taken into consideration in arriving at the amount to be paid to the retiring partner, and that the debt of the selling partner was taken into account in fixing the sale price. Hamilton v. Fells, 182 Ill. 144; Milroy v. Hoyt, 123 Ill. App. 568.

The Court below had no alternative, in the state of the proof, but to instruct a verdict as requested. There was no question of fact for the jury to pass upon. The effect of the releases in evidence was one of law for the court's interpretation,

and not one for the jury. The settlement and release of all claims of plaintiff against defendant and vice versa, evidenced by the two agreements of dissolution in evidence, there being no fraud or mistake charged or proven, presented only questions of law for the decision of the trial Judge. Where language is unequivocal, although the parties may have failed to express their real intention, there is no room for construction, and the legal effect of the agreement must be enforced. Benjamin v. McConnell, 9 Ill. 536.

It was the duty of the court to construe the dissolution agreements and the release of August 4, 1910, and to declare their meaning and legal effect to the jury and to direct a verdict, if, in the state of the case, a construction of these instruments determined the controversy. If there existed any doubt that the dissolution agreements were in terms a release of all indebtedness from one to the other of the parties, the general release of August 4, 1910, was undoubtedly effectual to settle every controversy between them to the day of its date. It is as broad and comprehensive in its terms as words can well make it, and concludes all matters, causes, or things happening between them from the beginning of the world to its date.

But it is said on the part of defendant that the concluding recital quoted above restricts and limits the general words of the release. We are unable to see that any words appearing in the final recital have any effect whatever upon the general terms of the release preceding such recital. The limiting words so claimed, the whole instrument considered, have no restricting influence and in no way detract from the instrument as a general release. The final clause simply confirms the title to property which defendant already had and ratifies the agreements of dissolution of the two firms in which both had been partners. In this

respect this case is analogous to Lischner v. The Sew Home Sewing Machine Co., 135 N. Y. 182. In the face of these releases plaintiff has no cause of action against defendant for the claim set out in his pleading in which a court either of law or equity could afford him relief.

This record being free from error, the judgment of the Municipal Court is affirmed.

AFFIRMED.

488 - 19891

JONES & LAUGHLIN STEEL COMPANY,
a corporation,

Appellee,

vs.

ANDREW J. GRAHAM,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

1941 A. 571

STATEMENT OF THE CASE. Prior to January 24, 1900, Jones & Laughlin, Limited, a limited partnership or joint stock association, William P. Rend and Edwin Walker, a co-partnership as W. P. Rend & Co., and another creditor, had recovered judgments against William D. Kent, of Chicago. Executions on said judgments had been placed in the hands of the sheriff of Cook County, Illinois, and that official had levied on certain merchandise and fixtures, owned by said Kent, at Nos. 18 to 22 North Union Street, Chicago. Prior to the day set for the sale on said executions and on January 24, 1900, Andrew J. Graham, a Chicago banker and a friend of Kent, entered into a written agreement with said Jones & Laughlins, Limited (hereinafter referred to as Jones & Laughlins), and also into a similar written agreement with said copartnership of W. P. Rend & Co. In the first mentioned agreement it was agreed that Graham should purchase and Jones & Laughlins should sell a certain judgment for \$1,189.52 (which the latter had recovered in the Superior Court of Cook County on January 9, 1900, against Kent) upon the terms and conditions therein specified. It was further provided in said agreement (1) that Graham was "to cause the judgment debtor (Kent) to execute and deliver to said Jones & Laughlins" two notes, dated

January 24, 1900, for the sum of \$752.30 each, due in six and nine months after date respectively, and bearing interest at 6% per annum from date; that Jones & Laughlins was thereupon to assign to Graham said judgment together with all rights thereunder; (3) that Graham was to purchase all of the merchandise and fixtures advertised for sale by the sheriff at 18 to 22 North Union street, Chicago, "at such price as he may deem best" and to obtain from said Kent a proper bill of sale therefor; (4) that Graham was thereupon "to form or cause to be formed an Illinois corporation with a capital stock of \$25,000," divided into 250 shares of a par value of \$100 each, "and to transfer to said corporation" all of the merchandise and fixtures so purchased by him, "and to receive therefor from said corporation 51 per cent. of said capital stock," to-wit: \$12,750 worth at par, and no more, and no other consideration or payment from said corporation; that said merchandise and fixtures so transferred were "to be free from all liens, claims or demands, either patent or secret, of whatever name or nature"; and that Graham was also to "cause said corporation to execute and deliver to said Jones & Laughlins, Limited, in exchange for the notes to be executed and delivered by the said judgment debtor, William D. Kent, * * two collateral promissory notes * * for the same amounts and interest and maturing at similar times"; and that the said 51% of the capital stock, to be issued to Graham or his nominee in payment for said merchandise and fixtures, was "to be placed with some Chicago trust company, to be agreed upon, as collateral security to the payment of said two notes and such other notes to other creditors of said William D. Kent as said Graham may find necessary to be given in order to carry out the plan which this agreement contemplates," but that the aggregate of all indebtedness

against said corporation at the time it commenced business was not to exceed \$5,000. The 6th paragraph of the agreement was as follows: "If the said Graham fails to form said corporation under the conditions and in the manner as above set forth, and fails to cause said notes of said corporation to be given as above set out, then he is to pay said notes so given by said Kent to said Jones & Laughlins, Limited, this guarantee being the essence and basis of this agreement." The provisions of the agreement between Graham and the copartnership of W. P. Rend & Co. were substantially the same, except that it therein appeared that the judgment which W. P. Rend & Co. had recovered against Kent on January 4, 1900, amounted to \$305.94, and that the amount of the note which Graham was to cause Kent to execute and deliver to said W. P. Rend & Co. was \$305.94, maturing July 1, 1900.

Thereafter Graham caused Kent to execute and deliver to Jones & Laughlins his (Kent's) two notes for \$752.30 each, and to execute and deliver to W. P. Rend & Co. a note for \$305.94. Graham also acquired all of said merchandise and fixtures advertised for sale by the sheriff, obtaining from Kent a bill of sale therefor. Graham also caused to be formed, in February, 1900, with the assistance of the law firm of Oliver & McCartney, the Illinois corporation of W. D. Kent Iron Company, with capital stock of \$25,000, divided into 250 shares of a par value of \$100 each. Under date of February 13, 1900, Graham executed a bill of sale of said merchandise and fixtures to Minnie H. Kent, and she in turn executed a bill of sale of the same, dated February 14, 1900, to said W. D. Kent Iron Company. Under date of March 2, 1900, said Iron Company issued to Minnie H. Kent a certificate of 128 shares of the capital stock of said Iron Company, fully paid and non-assessable, in

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payment for said merchandise and fixtures. Said 128 shares amounted to slightly more than 51 per cent. of the capital stock of said Iron Company. Under date of March 2, 1900, said Iron Company signed two promissory notes for \$752.30 each, payable to the order of Jones & Laughlins, due on July 24 and October 24, 1900, respectively, and bearing interest at 6% per annum from January 24, 1900, and also signed one note for \$305.94, payable July 1, 1900, to the order of W. P. Rend & Co., and bearing interest at 6% per annum from January 24, 1900. During February, 1900, John S. Brown, an attorney employed by Oliver & McCartney to attend to the legal details of organizing said Iron Company as a corporation, etc., informed the several attorneys of the judgment creditors of William D. Kent that it was desired that said creditors should each satisfy their respective judgments of record, rather than give an assignment of said judgments to Graham, and accordingly all of the judgment creditors subsequently satisfied of record said judgments. The judgment against William D. Kent in favor of W. P. Rend & Co. was satisfied of record on February 23, and that of Jones & Laughlins on March 17, 1900.

Graham, although often requested by the respective attorneys for Jones & Laughlins and W. P. Rend & Co., never caused said notes of the Iron Company to be delivered to the respective payees thereof, or caused 51% of the capital stock of said Iron Company to be placed with any Chicago trust company as collateral security for said notes and other notes. On July 27, 1905, Jones & Laughlin Steel Company, plaintiff, as successors of Jones & Laughlins, commenced the present suit in the Superior Court of Cook County to compel Graham to perform his alternative promise, viz., to pay said Kent notes of \$752.30 each, and interest, then owned and held by it. And

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4. The first two conditions are satisfied by the following functions:

on the same day William P. Rend, successor to the copartnership of W. P. Rend & Co., commenced a similar suit in said court to compel Graham to pay said Kent note of \$305.94, and interest, then owned and held by said William P. Rend.

The two cases came on for trial in June, 1913, before the court without a jury, and it was stipulated by respective counsel that evidence in both cases should be heard at the same time. On June 11, 1913, the court found the issues in the instant case in favor of the plaintiff, Jones & Laughlins Steel Company, and assessed its damages at the sum of \$2,712.32, and on the same day, after overruling motions for a new trial and in arrest of judgment, entered judgment on the finding against the defendant, Andrew J. Graham, which judgment said defendant by this appeal seeks to reverse.

During the year 1900, and subsequently, Jones & Laughlins, were represented in this matter by Attorney H. H. C. Miller, and in his absence by Attorney W. S. Oppenheim; W. P. Rend & Co., were represented by Attorney Louis C. Ehle; and the Richards & Kelley Mfg. Co., another creditor, was represented by Attorney Charles A. Koepke. On April 3, 1900, Attorney John S. Brown wrote said attorneys for said creditors as follows: "I now have in my possession the notes executed by W. D. Kent Iron Company pursuant to your contract with Mr. Andrew J. Graham. I have also the stock certificate which was to be deposited as collateral to said notes. As the contract with the various parties did not provide for a separation of the stock, it will be necessary to have a meeting of all the parties and to have an agreement with all the parties. I invite you to be present at our office on April 6th, 3 o'clock P.M., for the purpose of formulating a collateral agreement and agreeing upon a trust company to hold the stock certificates and notes executed by W. D. Kent Iron Co. Please bring in the

old notes." Accordingly a meeting was held on April 6, 1900, at which the defendant Graham, Attorney John S. Brown and Attorneys Miller, Ehle and Koepke were present. John S. Brown testified that at this meeting "somebody suggested, either myself or someone else, * * that a trust company would have to be appointed under the contract with which to deposit the collateral. * * I had the notes there and stock ready to deposit when the parties agreed on a trust company. * * Somebody said there that the matter would have to go over because the parties were not all represented and they would have to consider what trust company to appoint." Louis C. Ehle testified that at this meeting "the talk was about carrying out this agreement of Mr. Graham"; that "Mr. Miller or myself asked what was the situation, and Mr. Graham, in substance, said that he would make a report in regard to the matter, and then Mr. Brown raised the matter of appointment of a trustee, and either Mr. Miller or myself said there was not anything in our contract about the other parties, but that we were willing to have a reliable trustee, and the Security Title & Trust Company was suggested"; that Mr. Miller, Mr. Koepke and Ehle at this time represented all the creditors involved and that all expressed themselves as being satisfied that said Security Company act as trustee; that other meetings were had in the endeavor to get the said notes of the Iron Company delivered and the stock deposited, without avail; that on July 11, 1900, he (Ehle) wrote Graham to the effect that said Kent note of \$305.94, payable to the order of W. P. Rend & Co., due on July 1st, was still unpaid, and that unless the same was taken up at once action against Graham on his agreement would be commenced; that Graham returned the letter with the following endorsement thereon: "I done all you ask except I can't force you or Mr. Rend to take note. Mr. Brown with Oliver &

Mecartney has note"; that other meetings were had in September, 1900, and February, 1901, but that said creditors were never able to get said notes of the Iron Company or said 51% of the stock deposited as collateral security thereto; that the notes were never tendered to him (Ehle) and that "all that ever was said by Mr. Brown or Mr. Graham with reference to that matter was that it would be attended to, or something to that effect, something in the way of putting it off." Charles A. Koepke testified that he was present at several meetings with Ehle, Miller and Graham when "we were trying to get Mr. Graham to carry out his agreement," but that the creditors could never get the notes, and that neither Graham nor anyone else at any of the meetings ever tendered to either Koepke or Ehle any notes of the Iron Company. W. S. Oppenheim testified that in Mr. Miller's absence he was present at one or more meetings of said attorneys and Graham; that he on one occasion met Ehle, Koepke and Graham; that he went to the meeting for the purpose of getting certain notes under said contract, but that he did not get them; that no tender of any of the notes of the Iron Company was ever made to him by either Brown or Graham, and that H. H. C. Miller died in October, 1910. The defendant Graham testified that he attended several meetings; that he was never at a meeting where all the parties interested were present; that at the meetings in April and September, 1900, the stock and notes were ready; that finally he "left the stock and notes with John S. Brown to deliver to the parties when they agreed upon a trustee. * * I said to Mr. Brown to deliver the stock and notes when requested by the creditors and a trustee was selected to receive the same." John S. Brown further testified: "One of the reasons that I did not deposit the notes and stock which I had was because some creditor was not there. I think that was the reason reason. Because as a consequence the necessary parties had not agreed on a trust company."

[illegible]

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

We are of the opinion that the finding of the trial court was proper and that the judgment should be affirmed.

We regard the agreements on Graham's part contained in the contract sued upon as original promises made in the alternative. Jones & Laughlins had obtained a judgment against William D. Kent and a levy had been made on the latter's property and a sale was about to be made to satisfy said judgment. Jones & Laughlins in effect agreed that they would release their lien on Kent's property in consideration that Graham would purchase the property, cause a corporation of \$25,000 capital stock to be organized, and cause to be transferred to said corporation said property, free from all liens, in consideration of receiving 51% of the capital stock thereof, and that then he would (1) cause said corporation to execute and deliver to Jones & Laughlins its collateral notes in exchange for the personal notes of Kent, then held by them, and cause to be deposited with some Chicago trust company to be agreed upon said 51% of said capital stock as collateral security for the payment of said notes, or (2) would himself pay said Kent notes. "Where the question involved is whether the promise is original or collateral, the test is whether the credit is given to the person sought to be charged, or to some one else." (Lusk v. Throop, 189 Ill. 127, 135; Geary v. O'Neil, 73 Ill. 593, 595.) Graham promised that he would cause certain specific things to be done, or if he failed to do them he would pay the Kent notes. It is quite apparent, we think, that Jones & Laughlins would not release Kent's property from the lien of their judgment in reliance upon the receipt of Kent's unsecured notes, and that Jones & Laughlins extended the credit because of

the promises made by Graham in the contract. The evidence shows that while the corporation, W. D. Kent Iron Company, executed the notes provided for in the contract, Graham did not cause said notes to be delivered to Jones & Laughlins and the same never were delivered, though their delivery was several times demanded. There is also evidence tending to show that Graham did not cause the 51% of the stock to be deposited, as collateral security to the payment of the notes of the Iron Company, with a Chicago trust company, although representatives of Jones & Laughlins and other judgment creditors had agreed upon a certain trust company, of which fact Graham and the Iron Company had knowledge.

And we do not think that plaintiff is prevented from recovering in this case because of the fact that it failed to allege and prove a tender to Graham of the individual notes of Kent. He agreed to cause the notes of the Iron Company to be delivered to Jones & Laughlins in exchange for the Kent notes, but the evidence tends to show that he never tendered said notes of the Iron Company to Jones & Laughlins. Furthermore, Graham never refused to cause said notes of the Iron Company to be delivered upon the ground that Jones & Laughlins had not tendered and would not deliver the Kent notes, but upon the ground that all the creditors had not agreed upon the trustee to hold said stock.

The evidence shows that on July 1, 1905, prior to the commencement of the present suit, Jones & Laughlins, by written assignment and for a valuable consideration, assigned to plaintiff all of its right, title and interest in and to said contract, dated January 24, 1900, between Graham and Jones & Laughlins. We do not think that the point made by counsel for defendant that the contract in question was not assignable is well taken. Neither do

we think that the fact that Jones & Laughlins released of record their judgment against Kent, instead of assigning the same to Graham, is important. The object sought to be accomplished was to get the lien of the judgment released from Kent's property. It would make no practical difference whether Jones & Laughlins assigned the judgment to Graham and he released the same or whether Jones & Laughlins released the same of record. Furthermore, it appears that this method of procedure was adopted at the suggestion of the attorney who was acting, in effect at least, as Graham's agent, in that connection.

The judgment of the Superior Court is affirmed.

AFFIRMED.

194/574

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357 - 20292

JOHN FANNING, Administrator of
the Estate of James Fanning,
deceased,
Appellee,
vs.
CITY OF CHICAGO,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

157 LA. 274

STATEMENT OF THE CASE. On December 9, 1910, John Fanning, as administrator of the estate of James Fanning, deceased, commenced an action in the Superior Court of Cook County against the City of Chicago and the Eagle Tank Company to recover damages for the death of James Fanning in an accident which occurred on the afternoon of August 11, 1910, in a public alley in the rear of the premises of said Eagle Tank Company at Nos. 1315-45 West 21st place in the city of Chicago. The trial was had before a jury in November, 1913. During the trial plaintiff dismissed the case as to the Eagle Tank Company and also dismissed the second of the two counts of the declaration. The jury returned a verdict finding the defendant, City of Chicago, guilty and assessing plaintiff's damages at the sum of \$5,000, upon which verdict judgment against the City was entered.

In the first count of the declaration, to which the City had filed a plea of the general issue, it was alleged, inter alia, that on August 11, 1910, said Eagle Tank Company was operating a certain tank manufacturing establishment at Nos. 1315-45 West 21st place in the city of Chicago, which said premises "adjoined and abutted upon a certain public highway * * which said public highway was known as a public alley," located between 21st place and 22nd street and extending in an easterly and westerly



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direction; that on the day aforesaid the City of Chicago negligently permitted said alley to be and remain in a dangerous and obstructed condition in that certain steam pipes were suffered and permitted to extend across said alley at a distance of about 10 feet above the surface thereof, and from the premises of said Eagle Tank Company and connected therewith, and that said steam pipes were a dangerous obstruction and rendered the use of said alley by the public dangerous and unsafe, all of which conditions the City of Chicago well knew, or in the exercise of reasonable care could have known in time to have remedied the same before the happening of the grievances complained of; that on the day aforesaid, and prior thereto, plaintiff's intestate was in the employ of said Eagle Tank Company as a teamster, and it was his duty to drive along, upon and through said alley and underneath said pipes, in entering and leaving the premises of said Eagle Tank Company; that on the day aforesaid, while plaintiff's intestate was driving out of said premises of said Eagle Tank Company, and while in the discharge of his duties and while exercising due care, etc., he unavoidably came in contact with and struck with great force and violence against said pipes, and was knocked from the wagon upon which he was riding, and which he was driving, to and upon the ground, and was so severely injured that as a result thereof he died on the same day; that deceased left him surviving a widow and next of kin, etc., and that plaintiff on October 4, 1910, served notice, as required by statute, etc.

William G. Olsen, president of the Eagle Tank Company and a witness for plaintiff, testified that the alley in question was a "public alley"; that deceased had been in the employ of the Tank Company for about a year, engaged in driving wagons loaded with lumber and other materials for making tanks out through the alley and under the pipes; that the pipes were



one-inch pipes and were about 13 feet above the ground; that they had been there since the Tank Company took possession of the premises in January, 1909; that on the day in question the wagon was loaded with lumber of different lengths prepared to be put together to form a tank; that the load consisted of staves and bottoms; that the staves were on the bottom of the load and were dressed in a circular shape so that they would not lie flat on the wagon; that there was no chain around the load; that the top of the load was between 8 and 9 feet from the ground; that the accident happened on a clear day about 4 o'clock, and that deceased "was a careful man." No witness was able to say just how the accident happened. Aaron Van Cleave, a witness for plaintiff and employed as engineer in a factory just across the alley from the plant of the Eagle Tank Company, testified that the wagon was loaded with wood and metal, that there were staves about 16 feet long, and that there was a conical top of a tank and an iron ladder. He further testified: "After Fanning talked to me he went ahead and hitched on to his wagon, and I sat there reading a paper. I looked up and saw Fanning climbing on to his wagon and begin to right himself around. He climbed up from the front wheel and was right at the front end of the load in a standing position, just righting himself up. At that time the team was standing still. * * * The next thing I saw was his body almost to the ground. * * By that I mean he was in the act of falling off the back corner of the wagon, * * over the left-hand wheel. * * The wagon was then going, just passing around the corner of the building. It was just past those pipes. * * Fanning fell on the left side of the wagon, that would be the north side between the wagon and the Tank Company's building. I also saw some of the conical top fall from the right-hand side of the wagon just as it made the turn. * * I went immediately to

Fanning. * * His body lay * * about three or four feet east of the pipes. * * It seemed like the front part of his body or head struck the ground. It was as if he was diving in the water." He also testified that when the team was standing still and he saw Fanning climbing on to the wagon "the horses' heads could not have been over eight feet west of the pipes"; that one of the horses "had a nervous disposition" and "couldn't stand very good"; that Fanning was a tall man, six feet or over; that the load was "about eight inches higher than the stakes"; and that Fanning "was a good horseman and an ordinarily careful man." On the day following the accident another teamster, Matthew Walsh, a witness for plaintiff, made certain experiments. He testified that he sat upon a lumber wagon, loaded with tank lumber several inches above the stakes, underneath the pipes; that when he stood up the pipes crossed him "right at the shoulder," and that when he sat down on the top of the load the pipes were about 18 inches higher than the top of his head.

Plaintiff offered in evidence the verdict of the coroner's jury, and the same was admitted in evidence over the objection of the defendant. A portion of that verdict is as follows:

"From the evidence offered, the jury are of the opinion that some pipes extending across the alley from the southeast corner of the Eagle Tank Company building to the building on the south side of said alley knocked the deceased off his wagon as he attempted to pass the same. The jury recommend that the ownership of said pipes be investigated, and that they be moved to a point sufficiently high so that vehicles, loaded and empty, may pass under the same in safety."

At the close of plaintiff's evidence the court denied the motion that the jury be instructed to find the defendant not guilty. The only evidence introduced by defendant was certain portions of Van Cleave's testimony before the coroner's jury. The defendant, in connection with the question of the due care of the deceased, offered to prove by certain teamsters that it was cus-

tomary, when loading such a load as the one in question to be hauled over four miles, to fasten it on with a chain or other device. Objection was made to this line of testimony and the objection was sustained. At the close of all the evidence the defendant renewed its motion for a peremptory instruction, which motion was again denied. Among the many instructions offered by the defendant and given by the court was the 20th, wherein the jury were instructed that the above quoted portion of the coroner's verdict be disregarded by the jury and be not considered by them in making up their verdict.

MR. PRESIDING JUSTICE GRIDLEY
DELIVERED THE OPINION OF THE COURT.

It is contended that there was no proper proof made on the trial that the alley in question was a "public" alley, and that in order to establish the City's liability both a dedication and acceptance should have been proved, which was not done. We do not think there is any merit in the contention in this case. It was alleged in the first count of plaintiff's declaration that the alley was a public one, and the City filed a plea of the general issue to that count. The point was not raised in the trial court - the case having been tried without objection on the theory that said alley was a public one. The witness Olsen testified without objection that it was a public alley and there was no testimony to the contrary.

It is also contended that the trial court should have directed a verdict for the city because (1) there was no evidence to show that the obstruction of the pipes was the proximate cause of the injury, and (2) that the decedent was guilty of such contributory negligence as bars a recovery by his administrator. As

to the first point, the argument is that there is no positive evidence that the deceased was knocked off the wagon by coming in contact with the pipes, and that there is another theory of the accident, which is just as tenable, viz: that after taking his seat on top of the load the movement of the wagon caused the load to slip, thus throwing him to the ground. We think there is evidence tending to show that the accident was caused by the deceased suddenly coming in contact with the pipes, which constituted an obstruction and which the City had negligently permitted to remain in the alley. "The question, whether or not the negligence of appellant was the proximate cause of the injury, was a question of fact for the jury, and they have settled it against appellant." (Missouri Iron Co. v. Dillon, 206 Ill. 145, 157.) As to the second point it is argued that the deceased, in order to have come in contact with the pipes, must have been standing upon the top of a high load, loosely built up and unstable, and that he was guilty of contributory negligence in placing himself in such a position. We think it was for the jury to say whether he was guilty of contributory negligence and we are not disposed to disturb their verdict. There was evidence that the deceased was an ordinarily careful man. "Due care may be shown by circumstances as well as by direct testimony, and the fact that the deceased, as the time of the accident, was guilty of negligence may be shown by his habits and by what are known to be the instincts of self-preservation in persons possessed of their natural faculties and who are ordinarily sober and careful of their personal safety." (Chicago & Alton Ry. Co. v. Wilson, 225 Ill. 50, 53.)

Complaint is made that the court erred in admitting in evidence the coroner's verdict, and particularly the latter portion thereof where it is stated that "the jury are of the opin-



ion that some pipes extending across the alley * * knocked the deceased off his wagon as he attempted to pass the same." The coroner's verdict, being competent evidence, was properly admitted in evidence. (United States Ins. Co. v. Vocke, 129 Ill., 557, 557; Foster v. Shepherd, 258 Ill. 164, 182.) If the portion referred to was prejudicial to the City, it is in no position to here complain because it requested that the court instruct the jury to disregard said portion of the verdict, and the court so instructed the jury. (City of Chicago v. Cohen, 139 Ill. App. 244.)

And we do not think that the trial court, in refusing to admit the offered testimony of certain teamsters referred to above in the statement of the case, committed error prejudicial to the City. (Illinois Central R. Co. v. Smith, 208 Ill., 608, 612.)

The judgment of the Superior Court is affirmed.

AFFIRMED.

KALMON SCHWITZ,
Defendant in Error,

vs.

LOUIS J. SLEPH and SIMON SLEPH,
Plaintiffs in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

1941 A. 579

MR. DEPUTY JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

Kalmon Schwitz, plaintiff, brought an action in trover in the Municipal Court of Chicago against Louis J. Sleph and Simon Sleph, defendants, for damages for the conversion of 5,149 pounds of copper metal. It was alleged in plaintiff's statement of claim that on October 22, 1912, he was the owner and possessed of said metal of the value of, to wit, \$900; that on said day he agreed to sell and deliver the same to said Louis J. Sleph upon being paid therefor by said Sleph the sum of \$823.84, in cash or its equivalent; that thereupon said Sleph delivered to plaintiff a paper purporting to be a check drawn upon the Fort Dearborn National Bank of Chicago, but which was not properly drawn, and said Sleph falsely represented to plaintiff that there were sufficient funds from which said check would be honored and paid on presentation, whereby said Sleph came into the possession of said metal and delivered the same to the defendant Simon Sleph; that both defendants, well knowing said metal to be property of plaintiff, have not delivered the same or any part thereof, although often requested, but have refused so to do, and on the same day converted and disposed of the same to their own use, etc. The affidavit of merits of both defendants denied that they had converted any goods or chattels of the plaintiff. The cause was tried before the court without a jury, resulting in the court finding the issues against

both defendants and assessing plaintiff's damages at \$875.33, in tort, upon which finding judgment was entered.

Counsel for defendants argue and rely upon several propositions of law as grounds for a reversal of the judgment. So far as the abstract of record shows there is nothing for us to decide except as to whether the evidence is sufficient to sustain the court's finding, for no objections were made to the court's rulings upon evidence, no motion made to find the issues for defendants and no propositions submitted to the court to be held as the law of the case. (Flodin v. W. B. Lutes Co., 191 Ill. App. 195, 197; Mutual Protective League v. McKee, 223 Ill. 364, 366; Bolton v. Johnston, 163 Ill. 234.)

The material facts as disclosed by the evidence are as follows: The defendant Louis Sleph was the treasurer of Sowers-Sleph Co., a corporation. Louis Sleph was the son of the other defendant, Simon Sleph. The latter was the senior partner of the firm of Sleph, Sandrovitz & Goldblatt, engaged in the smelting and refining business. The business of Sowers-Sleph Co. was located on Jefferson street, Chicago, which premises were owned by said firm and were rented to said company. The son's company was therefore tenant of the father's firm, and said company owed said firm about \$140 for unpaid back rent. Plaintiff, prior to October 22, 1912, had had various business dealings both with Louis and with Simon. On said day Louis, the son, personally bought of plaintiff at the latter's place of business in Chicago certain copper metal for cash at so much per pound, which metal was weighed in presence of the parties and found to be of the value of about \$823. Plaintiff insisted upon immediate payment in cash, and Louis gave plaintiff a check, drawn on the Fort Dearborn Bank, payable to the order of plaintiff for \$800, and signed by J. L. Sowers, president of the Sowers-Sleph Co. On the face of the

check was a space for the signature of Louis Sleph, as treasurer of the company, but Louis did not countersign the check. Louis also gave plaintiff his personal check for the balance \$23, and the former took away the metal. Louis, the son, testified that he had sold the metal to his father, Simon, before he purchased it from plaintiff. The check for \$500 was on the same day presented to the bank for payment, but payment was refused because the Sowers-Sleph Co. then had only \$93 to its credit and because the check was not countersigned by the treasurer of the company. Plaintiff made no attempt to have the \$23 check cashed and at once went to Simon's, the father's, place of business and there "found all of the stuff." Plaintiff demanded the goods and Simon told him to go and see his son, Louis, and that the latter would pay for the goods. Plaintiff then saw Louis but Louis failed to pay for the goods. On the following morning plaintiff, with his attorney, again called on Simon but the latter refused to give plaintiff either money or the goods.

After reviewing the transcript we are of the opinion that the evidence tends to show a preconcerted arrangement between the defendants to obtain possession of the copper metal with the fraudulent purpose of escaping payment therefor, and that the finding of the trial court against both defendants is amply supported by the evidence. The court stated that the finding and judgment included interest. The value of the metal on October 22, 1912, appears to have been at least \$823. The finding and judgment were entered on February 16, 1914. Figuring interest on said amount from October 22, 1912, up to the date of the judgment at the rate of 5 per cent per annum, it does not appear that the judgment is excessive, as claimed by counsel. The judgment of the Municipal Court is affirmed.

AFFIRMED.

LUCY SHANHOLTZ,
Defendant in Error,

vs.

B. H. HELLEN and MYRTLE M. HELLEN,
doing business as the Michigan
Central Park Company,
Plaintiffs in error.

)
) Error to
)
) Municipal Court
)
) of Chicago.

) 1941.A. 582

STATEMENT OF THE CASE. The defendants, B. H. Hellen and Myrtle M. Hellen, seek by this writ to reverse a judgment for \$759.50, rendered against them in favor of Lucy Shanholtz on March 21, 1914, in the Municipal Court of Chicago. The suit was commenced on June 4, 1913, and was tried before the court without a jury. Plaintiff (defendant in error) has not entered her appearance or filed a brief and argument in this court.

In plaintiff's amended statement of claim, filed July 1, 1913, it is alleged, in substance, that her claim is for \$800 for "money had and received by the defendants from the plaintiff without any consideration" and which money is due her from them; that prior to March 14, 1911, the defendants were engaged in the city of Chicago in the business of selling certain Michigan lands, and represented to plaintiff that her son-in-law, Asa M. Daugherty, had selected and purchased a certain parcel of land in Crawford County, State of Michigan, viz: "The northwest quarter (N. W. 4) of the southeast quarter (S. E. 4) of section thirteen (13), township twenty-five (25), north range three (3), west, containing forty (40) acres more or less according to government survey"; that



100-1001

The following table shows the percentage of the population in the United States who were in the labor force in 1950 and 1960. The percentage of the population in the labor force in 1950 was 58.1% and in 1960 it was 54.1%. The percentage of the population in the labor force in 1950 was 58.1% and in 1960 it was 54.1%.

In 1950, the percentage of the population in the labor force was 58.1%. In 1960, the percentage of the population in the labor force was 54.1%. The percentage of the population in the labor force in 1950 was 58.1% and in 1960 it was 54.1%.

defendants, for the purpose of inducing plaintiff to enter into a contract to purchase certain land and of gaining possession of some of plaintiff's money, represented to her that they had for sale another parcel of land adjoining the parcel selected and purchased by said Daugherty, viz: The northeast quarter (N. E. $\frac{1}{4}$) of the southeast quarter (S. E. $\frac{1}{4}$) of said section thirteen (13) in said Crawford County, and also represented to her that said northeast quarter was land "of a good quality and of a rich and productive soil, and that the farmers in that vicinity were raising upon the same character of land from 60 to 65 bushels of potatoes to the acre, and that said forty (40) acres was worth the sum of \$800"; that plaintiff was then a resident of Chicago and entirely unfamiliar with the land in said Crawford County, or its value, or the productivity of its soil, and relied entirely upon the said statements and representations of the defendants, and agreed to purchase from defendants said northeast quarter for said sum of \$800, and then and there paid defendants upon the purchase price the sum of \$400; that thereafter, on April 4, 1911, plaintiff, still believing all of said representations to be true, moved with her family upon said northeast quarter and immediately thereafter caused a house to be constructed thereon which cost her the sum of \$500; that all of said representations so made to her by the defendants were false and fraudulent, and were known to the defendants when made to be false and fraudulent, and were made by them for the purpose of deceiving plaintiff and of inducing her to deliver to them the said sum of \$400; that said parcel of land first above described, viz: said northwest quarter, was not selected and purchased by said Daugherty, and that said parcel of land last above described, viz: said northeast quarter, and sold as aforesaid to plaintiff, did not adjoin any land at any time selected and purchased by said Daugherty, and was not worth said sum of

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\$800, and was not of a rich and productive soil and yielded not more than from 5 to 10 bushels of potatoes to the acre; that thereafter, during the fall of 1911, plaintiff, after discovering the fraud practiced upon her by defendants and their false and fraudulent representations, removed from said land and refused to make any more payments and so notified defendants; that thereafter, on April 29, 1913, she received a letter from defendants as follows: "Please take notice that we shall cancel your contract on the 40 acres if payment is not made within 10 days from this date"; and that plaintiff has long since abandoned and given up to the defendants said parcel of land together with all buildings constructed thereon because of the fraudulent and untrue representations made by the defendants to her concerning said land.

To this amended statement of claim was attached the affidavit of said Asa H. Daugherty, stating that he is the agent of plaintiff, that the nature of plaintiff's demand is as set forth in said statement of claim, and that there is now due and owing to the plaintiff from said defendants the sum of \$900. The defendants filed an affidavit of merits in which they in substance denied having received any money from the plaintiff without consideration and denied making any false and fraudulent representations to plaintiff as stated in her statement of claim, and defendants alleged that on March 14, 1911, plaintiff purchased from them said northeast quarter, in said Crawford County, Michigan, for a consideration of \$800, to be paid in installments, and that plaintiff entered into a written contract for such purchase and thereafter took possession of said land and made improvements upon the same while retaining said contract in her possession; that thereafter plaintiff failed to make the payments from time to time which she had therein agreed to pay, and thereby plaintiff, according to the provisions of the contract, forfeited all interest in

said land and authorized defendants to declare said contract void, etc., and that on or about April 29, 1913, the defendants did declare said contract void, which contract was ready to be produced in court upon the trial.

The main witnesses for plaintiff were the plaintiff, her daughter, Mrs. Daugherty, her son-in-law, Asa K. Daugherty, and Edward J. Bleier. It appears from the testimony of Mr. Daugherty that he is a locomotive engineer, residing in the city of Chicago; that he had lived on a farm until he was 24 years old; that in October, 1910, in company with said Edward J. Bleier, then a salesman for defendants, and three other men, he went to Crawford County, Michigan, and inspected certain unbroken lands and selected 40 acres; that he was there for one-half day; and that he returned to Chicago and on November 17, 1910, signed a contract, written out by said Bleier, for the purchase of 40 acres, viz: said northwest quarter of said southeast quarter, at the price of \$800, to be paid \$40 down and \$10, or more, each month.

The plaintiff testified that she resides in Peace Valley, Missouri; that she had lived in West Virginia, Illinois and Missouri, and had been farming all her life; that in March, 1911, she went to defendants' office in Chicago in company with her daughter, Mrs. Daugherty, and saw B. H. Hellen, and told him she wanted to purchase 40 acres of land adjoining the land purchased by her son-in-law and that he then marked off on a map 40 acres of land which he said adjoined the land of her son-in-law; that he stated the land was new and uncultivated, that the soil was "black, sandy loam," was "good soil and would produce almost anything," and that "almost all kinds of grain would grow there"; that she decided to purchase said 40 acres at the price of \$20 per acre, and that on March 14, 1911, she again went to defendants' office, in company with her husband,

G. W. Shanholts, her daughter and her son-in-law, and signed a contract with defendants for the purchase of said northeast quarter of said southeast quarter at the price of \$800, and that, although the contract provides only for the payment of \$40 down and \$20 per month thereafter, she then "voluntarily" paid to the defendants \$400, one-half of the purchase price. The contract was introduced in evidence and further provided that she should be charged interest at 6% per annum on the deferred payments if same were not made "on time," that she should pay all taxes and assessments, that she should have possession of the land at "any time in the future," and that if she should fail to perform her contract, the first parties (defendants), immediately after such failure, would have the right to declare the contract void and to retain whatever might have been paid on the contract, and all improvements made on the land, as stipulated damages for non-performance of the contract, and take immediate possession of the land and remove the second party (plaintiff) therefrom. Plaintiff further testified that she had never seen the land and had no knowledge whether her son-in-law had purchased the identical 40 acres which B. H. Hellen had told her the former had purchased, but that she thought she was buying 40 acres of land about 4 or 5 miles from the village of Roscommon, Michigan; that she never made any further payments on the land; that on April 4, 1911, she, in company with her husband and two other daughters, went to Roscommon and a few days thereafter all went out and inspected the land; that she found it "raw timber land, with small trees and underbrush upon it"; that she made several visits to the land thereafter and that there was nothing to hinder her from examining into the character of the soil, but that she did not examine it "very much"; that about the middle of April "we went to clearing the land"; that she

had the 40 acres, as well as the 40 acres of her son-in-law adjoining, surveyed by a local surveyor, and that afterwards she bought lumber in Roscommon, had it hauled to her land, and her husband, a carpenter, commenced building a small house which was partially completed the last of April and "we moved into it and lived there until sometime in August"; that her son-in-law was not there when the land was surveyed and that he first came sometime in the month of July; that she hired a man to clear and plough one acre of the land and paid him \$8 therefor; that about the middle of May "we planted potatoes and a little corn and beans"; that her neighbors were about a mile away; that it was a long way to school and her daughters did not have any companions of their own age in the locality; that she paid out for the lumber for her house the sum of \$296, less \$30 for lumber not used and afterwards sold; that she paid out for having a well dug the sum of \$77.50; that before she moved into her house she lived in Roscommon and paid \$8 for rent; and that before she abandoned the land she ascertained that the soil thereof was "just solid yellow sand" and she did not think it was worth over a dollar an acre. Plaintiff's daughter, Mrs. Daugherty, testified that she first saw the land in June, 1911, that the soil was all "solid, yellow sand," and that she did not think the land was worth much of anything. Plaintiff's son-in-law, Jsa. H. Daugherty, further testified that he first saw the land in July, 1911; that he "acted as a kind of agent" in selling the 40 acres to plaintiff in that he received a receipt from defendants for \$40 to apply on his own contract for assisting in said sale; that after visiting the land in July, 1911, he, in company with plaintiff and her husband, called on B. H. Hellen at his summer home at Higgins Lake, Michigan, and told Hellen that he had been given the "wrong land," that Hellen replied that he had gotten the

parcel of land according to the signed contract, that he (Daugherty) said he had not been given the parcel of land that he had picked out, that "we both got hot and he (Hellen) ordered me off the place," and that then he returned to Chicago and shortly thereafter started suit against Hellen to recover back the money he had paid on the ground of fraud; and that the soil on plaintiff's land was "yellow sand" and was not worth over \$8 per acre. Plaintiff further testified that after said conversation at Higgins Lake she again called on Mr. Hellen and then asked him to deed her 20 acres of the 40 acres she had purchased and to take back and sell the other 20 acres to other parties for her benefit. Nearly a year later, on June 6, 1912, and after plaintiff had ceased to live on the land, she wrote B. E. Hellen from her home in Peace Valley, Missouri, in part as follows: "The lowest I will take for the 20 acres of land that I have already paid for is \$650. * * You can sell the other 20 acres for what you please. * * I would like a deed and abstract for that 20. * * That would give me a chance to trade it here and send you buyers, for there is lots of people round here who would like to go there. * * Sell the land as soon as you can and get as much down on it for me as you can, and the rest in monthly payments." Edward J. Bleier testified that he formerly worked for defendants as a salesman of the Michigan lands; that as a representative of defendants he accompanied Daugherty to Michigan when the latter selected his 40 acres; that he did not mean "to play any trick or practice any fraud" on Mr. Daugherty in pointing out the lands; that if "there was a mistake made" as to land which Daugherty had selected it was his (Bleier's) mistake; and that it was the usual practice of defendants at the time, if a buyer wanted to exchange one parcel for another parcel of the same size, to make the exchange.

At the conclusion of plaintiff's evidence the defendants moved that the court enter a finding in their favor, but the motion was denied.

B. H. Hellen, one of the defendants, testified that he and his wife carried on their business in the name of the Michigan Central Park Company; that he had been raised on a farm and had been selling Michigan lands for about 13 years; that the lands were in about the center of the state, in Roscommon and Crawford counties; that he had sold to various parties in that vicinity about 40,000 acres; that he recalled signing a contract, drawn up by Eleier, with Asa H. Daugherty for said northwest quarter of said southeast quarter; that at the time said 40 acres were sold to Daugherty he had no knowledge of the latter's selection of, or desire for, any other tract of land than that mentioned in said contract; that the first intimation he had received from any source that Daugherty claimed he had a right to 40 acres other than the tract mentioned in said contract was when he received a call from Daugherty at Higgins Lake in July, 1911; that at the time he sold plaintiff said northeast quarter of said southeast quarter he in good faith supposed he was selling her land which adjoined on the east the land which Daugherty had contracted for and had actually picked out; that he knew the character of the soil from previous personal inspection and that it would produce most any kind of crops adapted to that climate and that farmers in that vicinity raised good quantities of potatoes and other vegetables and crops; that the soil of the tract sold to plaintiff is not yellow sand; and that it is a good soil for apples or for the growing of corn; that in the year 1913 less than one acre of said tract produced about 50 bushels of corn. The defendants offered to prove by this witness that when plaintiff called on him in July, 1911, he told her that the

THE CONSTITUTION OF THE UNITED STATES

Article I, Section 1, Clause 1: All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

And the Senate shall be composed of two Senators from each State, chosen by the Legislature thereof, for a Term of six Years; and each Senator shall have one Vote.

Section 2: The House of Representatives shall be composed of Members chosen every second Year by the People of the several States; and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

And no Representative shall be under twenty five Years of Age; seven Years shall be the Term of Office; but he shall be eligible for Re-election immediately after such Term; and he shall, when elected, be a Citizen of the United States, and seven Years.

When elected, he shall be a Citizen of the United States, and seven Years.

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tract she held was good farming land, and that if she wanted to exchange it for another 40 unsold in the vicinity she could do so, but the court would not allow the witness to so testify. Many witnesses for the defendants testified to the good quality of the soil in the vicinity for raising corn, apples, potatoes and other kinds of vegetables.

During the trial the attorney for the plaintiff stated that the action was "for money had and received because of the fraud of the defendants" and "on account of the fraudulent representations of the defendant," and that fraud was the "heart and soul of the action."

It is apparent that the trial court in entering a finding for \$759.50, not only considered that plaintiff was entitled to recover the \$400 paid by her on account of the purchase price of said land, but also for all disbursements proved to have been made by her in connection with said purchase. The net amount paid for lumber which went into the house, viz \$266, the amount paid for digging the well, \$77.50, the amount paid for ploughing, \$8, and the amount paid for rent while living in Roscommon, \$8, all added to said \$400, make the total amount of \$759.50.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Counsel for defendants contends that the judgment should be reversed because (1) the charges of fraud, etc., as made in plaintiff's statement of claim are not sufficiently proved; (2) the judgment in any event is excessive, and (3) the court erred in many of its rulings on evidence and did not give the defendants a fair trial. In the view we take of the case a consideration of the last two points is unnecessary.

After a careful examination of this voluminous

record we have reached the conclusion that plaintiff did not prove her case as charged in her statement of claim and that the judgment must be reversed. The charges in substance are (1) that defendants made false and fraudulent representations as to the character of the land and the quality of the soil, upon which representations plaintiff solely relied, and (2) that defendants falsely and fraudulently represented that the 40 acres sold plaintiff adjoining the 40 acre tract previously sold to plaintiff's son-in-law, upon which representation plaintiff also relied. We do not think that the evidence shows that the defendants made such misrepresentations as to the character of the land and the quality of the soil as entitles plaintiff to recover. Furthermore, it appears that plaintiff had been farming all her life and that shortly after signing the contract and paying one-half of the purchase price she went upon the land, examined the same, built a house thereon, and made no complaints of any kind until after her son-in-law visited her and examined the lands in July, 1911. Indeed, the record does not disclose that she had made any charges that defendants had misrepresented the character and quality of the land until she commenced this suit in June, 1913; it discloses, rather, that she had become sick of her bargain. No charges of fraud are contained in her letter of June 6, 1912, to the defendant, B. M. Hellen, but the purport of the letter is that she would like to have a deed to one-half of the land (20 acres) which she had purchased, and to be relieved from paying the entire purchase price of the 40 acres, that she would be willing to sell said one-half of the land, provided she could get \$650 for it, and that she hoped defendants would be able to sell the land for her. The foregoing facts indicate that she did not rely on the representations as to the character and quality of the land. And in our opinion the evidence does

not support the charge that when plaintiff purchased her land the defendants fraudulently misrepresented that said land was adjoining the land which plaintiff's son-in-law, Daugherty, had previously selected and purchased. We think it clearly appears that at that time the defendants in good faith believed that Daugherty had not only contracted to buy, but had previously selected, said northwest quarter of said southeast quarter of said section thirteen, and further believed that in selling to plaintiff said northeast quarter of said southeast quarter they were selling her 40 acres of land immediately adjoining the 40 acres selected by Daugherty.

The judgment of the Municipal Court is reversed.

REVERSED.

FINDING OF FACTS. We find as ultimate facts in this case that the defendants, B. H. Hellen and Myrtle M. Hellen, or either of them, did not, for the purpose of inducing the plaintiff, Lucy Shanholtz, to purchase the land in question, fraudulently make to said plaintiff the false representations, or any of them, as alleged in plaintiff's amended statement of claim, and that plaintiff did not rely upon the representations alleged to be false and that plaintiff is not entitled to recover any moneys of said defendants.

FRANK ANDREE,
Defendant in Error,

vs.

Sheehan
GEORGE W. SHEEHAN,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

194 I.A. 587

MR. PRESIDING JUSTICE GRIDLEY

DELIVERED THE OPINION OF THE COURT.

On March 5, 1913, Frank Andree, plaintiff, commenced a fourth class action, in contract, against the Merchants Pulverizing Company, a corporation, George W. Sheehan and Walter E. Lund, defendants. In his amended statement of claim plaintiff claimed the sum of \$101 to be due him for certain merchandise sold and delivered, and the sum of \$330 for certain engineering work and labor performed in the installation of certain machinery in premises at No. 444 West Indiana Street, Chicago. The defendant Lund was not served with process. The cause proceeded to trial before a jury against said corporation and Sheehan. At the conclusion of plaintiff's evidence the court ordered the cause dismissed as to said corporation, but directed that the trial proceed against the defendant Sheehan. The jury returned a verdict in favor of plaintiff for \$330 for said engineering work and labor, and on March 2, 1914, the court entered judgment for that amount against the defendant, Sheehan, which judgment he seeks by this writ to reverse.

It appears from the evidence that on April 3, 1911, plaintiff gave to Sheehan a written option to purchase certain sugar pulverizing machinery for a "one-tenth in erect in a

1941. A. J. 1941

The first of the three main parts of the book is devoted to a general survey of the history of the world from the beginning of the world to the present. The second part is devoted to a detailed study of the history of the world from the beginning of the world to the present. The third part is devoted to a detailed study of the history of the world from the beginning of the world to the present.

It is shown that the world is a single entity, and that the history of the world is the history of the world. The world is a single entity, and the history of the world is the history of the world.

new company," which machinery plaintiff, prior to said date, had agreed to sell to George Fiedler, his nephew, for \$1,500. Thereafter, on June 14, 1911, the defendants, Sheehan and Lund, as first parties, and George Fiedler, as second party, entered into a written agreement, wherein said first parties agreed, inter alia, to complete the organization of an Illinois corporation, to be known as the Merchants Pulverizing Company, and said Fiedler agreed to transfer said machinery to the corporation in consideration of receiving one-tenth of its capital stock. The organization of the company was completed, the machinery transferred to it and said stock issued to Fiedler. In the fourth clause of said agreement it was provided that the first parties (Sheehan and Lund) "will pay all the money necessary for the purpose of completely setting up and installing the said machinery and pay for all the material necessary to be used in and about the installation of the same." In December, 1911, Fiedler sold his stock in the corporation to other stockholders for \$1,300, which amount he turned over to plaintiff in part payment of the \$1,500 which he had agreed to pay plaintiff for said machinery.

Plaintiff testified, in substance, that shortly after said written option of April 3, 1911, was signed the defendant, Sheehan, requested him to do the engineering work in and about the installation of said machinery in said premises; that he commenced said work on April 29, and was engaged therein for 33 days up to and including June 9, 1911; that the fair and reasonable charge for said work was \$10 per day; and that while he was superintending the installation of said machinery Sheehan several times visited said premises and expressed himself as pleased with the manner in which the work was progressing. The defendant Sheehan admitted that he had said to plaintiff that "we" would pay the expenses of hauling the machinery over to said

premises and pay "millwrights to put up the machinery," but he denied that he had at any time told plaintiff that he would pay him for work in installing said machinery. Fiedler testified that Sheehan said to plaintiff: "Go ahead and put in the machinery and see that everything is set up. * * I fix you up and pay you for whatever labor you do and time you lose there."

It is contended by counsel for defendant that if any liability existed to pay for plaintiff's work in installing said machinery it was a liability of the Merchants Pulverizing Company. We do not think so. That corporation was not fully organized until after plaintiff had performed his labor, and there was no proof that the corporation ever agreed to pay plaintiff. It is also contended that, by reason of the agreement of June 14, 1911, between Sheehan and Lund as first parties and Fiedler as second party, Sheehan, Lund and Fiedler were then co-partners, were liable to plaintiff as such, and that Fiedler was a necessary party to the suit. We cannot agree with counsel. By the fourth clause of said agreement Sheehan and Lund agreed to "pay all the money necessary for the purpose of completely setting up and installing the said machinery." We look upon this clause as containing a promise on the part of Sheehan and Lund for the benefit of third persons to pay for all the labor done in installing said machinery, and we think that Lund was a proper party defendant in the present action. Lund, however, was not served by the bailiff, and the question of the joint liability of Sheehan and Lund was not raised in the trial court.

It appears that on September 18, 1911, an attorney at law, acting under instructions from Sheehan and Lund who were then active in the affairs of the corporation, called on plaintiff and obtained a certain written release from him, by

which plaintiff released and quit-claimed to the Merchants Pulverizing Company "whatever right, title or interest, if any, I may have or might claim against or in * * the goods, chattels and property, * * * now located at the plant of Merchants Pulverizing Company * * * , and delivered, obtained and installed under or pursuant to a certain option dated April 3, 1911, and signed by me." It is contended that by this paper plaintiff released his claim for labor performed. We do not think so. The corporation had obtained the machinery which was formerly owned by plaintiff by a transfer from plaintiff's nephew, Fiedler, and it was evidently thought advisable to obtain a release from plaintiff of all claims to the machinery. Sheehan testified that the reason of obtaining the release was that "we wanted to finish our records." It will be noticed that no mention is made in the release of any claim for services or labor performed; it is only a release of all claims to certain goods and property, viz, the machinery mentioned in said written option of April 3, 1911.

We think that the verdict of the jury is fully supported by the evidence, and that the defendant was not prejudiced by any of the rulings of the court as to the admissibility of certain testimony. The judgment is affirmed.

AFFIRMED.

CITY OF CHICAGO,
Defendant in Error,
vs.
WASHINGTON PORTER,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

194 I.A. 590

STATEMENT OF THE CASE. A complaint, subscribed and sworn to by Elmer L. Williams, was filed in the Municipal Court of Chicago, in which it was alleged that "Washington Porter, 20 W. Jackson Blvd., late of said City of Chicago, on the 27th day of May, A. D. 1914, at the City of Chicago, aforesaid, did then and there permit the property owned by him, known as the Medina Hotel at 837-839 No. Clark St., to be used as a house of ill-fame or assignation within the limits of the City of Chicago, in violation of section 2017 of the Chicago Code of 1911," and that "affiant has reasonable grounds to believe that the said Washington Porter will escape unless arrested; and that said Washington Porter is not a resident of the City of Chicago, but is only temporarily in said city and is about to depart the same." One of the judges of said court after examining the complainant entered an order that a warrant for the arrest of the accused issue, and on June 13, 1914, he was arrested and gave bail. The case came on for trial before a jury on June 19, 1914, and before the hearing of any evidence the defendant moved for a rule upon the City to file a "bill of particulars with sufficient notice to the defendant of the offense charged," but the motion was denied and defendant excepted. On the following day the jury returned a verdict finding the defendant "guilty

1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 26

The jury returned a verdict finding the defendant guilty of first degree murder and sentenced him to death.

of a violation of the ordinance described in the complaint herein, known as 2017 of the Chicago Code of 1911," and assessing a fine against him of \$200. After overruling defendant's motions for a new trial and in arrest of judgment the court, on July 31, 1911, entered judgment on the verdict.

Sections 2017 and 2014 of said Chicago Code of 1911 provide as follows:

"2017. Any person leasing to another any house, room or other premises, in whole or in part, for any of the uses or purposes set forth in section 2014, or knowingly permitting the same to be used or occupied for such purpose, shall be fined not exceeding two hundred dollars."

"2014. No person shall keep or maintain a house of ill-fame or assignation, or place for the practice of fornication or prostitution or lewdness, under a penalty of not to exceed two hundred dollars for every twenty-four hours such house or place shall be kept or maintained for such purpose."

It appears from the evidence that the defendant is about 70 years of age and is a resident of the city of Chicago, having his business office at No. 20 West Jackson boulevard; that he has resided and been in business in the city of Chicago continuously since the year 1869; that he is and has been for 25 years the owner of the premises in question, a three story and basement stone and brick building at the northeast corner of North Clark and Chestnut street, Chicago; that in the year 1904 he leased said premises to John and Kennis Brannock, doing business as Brannock Brothers, for a term of 5 years; that in December, 1908, Brannock Brothers applied to him for a new lease for the additional term of 10 years, commencing May 1, 1909, and that defendant executed to them such a lease, dated December 14, 1908, but upon condition that the lessees would make all repairs and give all necessary care to the premises and relieve defendant wholly from all care thereof. By the terms of said lease the entire building was leased to said Brannock Brothers "to be occupied for a saloon, store and

TO A PERSONAL COPY OF THE REPORT OF THE
COMMISSIONER OF THE GENERAL LAND OFFICE
FOR THE YEAR 1881, IN ANSWER TO A
RESOLUTION OF THE HOUSE OF COMMONS,
PASSED IN JULY 1881, RELATIVE TO THE
LANDS BELONGING TO THE CROWN.

BY THE
COMMISSIONER OF THE GENERAL LAND OFFICE.

LONDON:
PRINTED BY THE STATIONER GENERAL,
AT THE GENERAL LAND OFFICE, 10, WHITEHALL, LONDON.
1882.

THE
GENERAL LAND OFFICE,
10, WHITEHALL, LONDON.
1882.

THE
GENERAL LAND OFFICE,
10, WHITEHALL, LONDON.
1882.

residence and for no other purpose whatever." It was provided in the 4th clause of the lease that the lessees "will not allow said premises to be used * * for any purpose other than that hereinbefore specified, nor be occupied, in whole or in part, by any other person, and will not sub-let the same, nor any part thereof, nor assign this lease, without in each case the written consent of the party of the first part * *; and will not permit said premises to be used for any unlawful purpose, or purpose that will injure the reputation of the same, * * or disturb the tenants of such building or the neighborhood."

It further appears from the evidence that on October 30, 1913, the Brannock brothers, accompanied by John Karr and John P. Stites, called upon defendant and requested him to consent to an assignment of said lease to said Karr and Stites. Papers were thereupon signed, by which Brannock Brothers assigned all their right and interest in the lease, guaranteed the performance by Karr and Stites of all covenants of the lease, and the assignees as well as Brannock Brothers assumed and agreed to make all payments and perform all the covenants, etc., and defendant signed his consent in writing to the assignment, upon the express condition "that the assignor shall remain liable for the prompt payment of the rent and the performance of the covenants on the part of the second party therein mentioned."

The complaining witness, Elmer L. Williams, a pastor of a church, testified that the first floor of the premises in question is occupied as a saloon and cigar store, and the two floors above as a hotel, called the Medina Hotel; that in the spring of 1913 he had his attention called to the fact that said hotel was being used for immoral purposes; that in April, 1913, he swore out a warrant for the arrest of the proprietor of said Medina Hotel, one R. B. Smith; that about that time he

called on the defendant, Porter, at his office at No. 20 West Jackson boulevard; that "I said, 'I have taken out a warrant for the proprietor, and I want to prove proprietorship, that is, if he leases this hotel from you'"; and that "Mr. Porter told me that he leased the property on a long time lease to Brannock Brothers, and that he had not been near the property for a long time, and did not know what was going on there. * * I told him I was there to tell him what was going on, and wished him to assist in cleaning the property. I have never talked with him since." He further testified that on June 13, 1913, he wrote defendant a letter and again on June 25, 1913, wrote him another letter. After the defendant had stated in open court that he had never received any letter at any time from said witness, and after said complaining witness had testified that he personally put each letter in an envelope, properly addressed to defendant at his office in Chicago, sealed and stamped the letter, and deposited it in a mail box, and that the witness' return address was on the envelope and that the letter was never returned to him, the court allowed carbon copies of said letters to be introduced in evidence over defendant's objections. The copy of the letter of June 13, 1913, was in part as follows: "Please notice that your property, known as the Medina Hotel, is being used for immoral purposes. The present occupants, Brannock Brothers, who run the saloon on the first floor, and Mr. Smith, who operates the so-called hotel on the second and third floors, are harboring immoral women. * * Mr. Smith has been arrested, arraigned and convicted in the Municipal Court. * * Please abate this nuisance, and avoid the necessity of action against you as the owner of this property." The copy of the letter of June 25, 1913, was to the same effect.

The defendant testified that he remembered Williams

calling on him some time in April, 1913, and telling him that the premises were being used for immoral purposes, but that at that time Williams did not give him any details upon which he based the charge. He further testified that he never at any time received a letter from Williams, and that from the time the lease was assigned to Karr and Stites, October 30, 1913, and until his arrest in June, 1914, he never received any information or intimation from any one that said premises were being used for immoral purposes, and that he had no knowledge that such was the case.

It further appears from the evidence that on April 24, 1913, said R. B. Smith, as proprietor of said hotel, was convicted in the Municipal court of "keeping a disorderly house for the encouragement of drinking and fornication," and the testimony of various witnesses for the plaintiff tended to show that on June 18 and October 21, 1913, and on February 16, March 21 and April 13, 1914, certain portions of the building on said premises were being used as a house of ill-fame or assignation and for the practice of fornication and prostitution.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

As we have reached the conclusion that the judgment should be reversed and a new trial had because of the prejudicial remarks of the attorney for the plaintiff, we deem it unnecessary to discuss the several other points relied upon for a reversal by counsel for defendant.

Plaintiff called as a witness a reporter for a Chicago newspaper, and he was allowed over objection to testify as to a conversation he had over the telephone with the defendant on the evening before the latter's arrest. The witness testified that during this conversation defendant

stated that "he had over 400 tenants, and that he paid \$60,000 taxes, and that it was about all one man could do to just keep general track of those things." Defendant's attorney moved that the above testimony be stricken out on the ground that the number of tenants defendant had or what taxes he paid had nothing to do with the case. The court granted the motion. During his closing address to the jury the attorney for plaintiff said:

X "The only purpose of the defense in this case has been to assassinate the character of a high minded preacher who is engaged in doing a great work, to make this earth the same kind of a place we want it to be in heaven; and they do that in order to save themselves the humility of being fined by this jury, so that it cannot be said that he is not a respectable man. He parades around in his riches as a great man, as a man of honor, a respectable citizen, and he makes his money how? * * I will tell you how he gets a part of it, and whether he gets it directly or indirectly has absolutely nothing to do with this case. * * We have not investigated yet; we have not got complaints from other parts of town. In other parts of town the preachers are not as aggressive unfortunately. If they were, we would find out some more about this man, and we would know where he gets some of his money. * * He gets it out of those prostitutes up there in that hotel who are compelled to sell their souls and their bodies in order to put gold into his coffers."

Defendant's attorney objected to the remarks, but the court ruled that plaintiff's attorney proceed, and an exception was taken to the remarks and to the ruling, and thereupon plaintiff's attorney indulged in further comments along the same line.

T We think that the remarks, unrebuked by the court, were highly prejudicial to the defendant, tended to arouse the passions of the jury-men and unduly influence them against defendant, and constituted reversible error. (Appel v. Chicago City Ry. Co., 259, Ill. 561; Parlin & Orendorff Co. v. Scott, 137 Ill. App. 454.)

The judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

W. D. JOHNSON,
Defendant in Error,

vs.

MYER JANOWITZ,
Plaintiff in Error.

ERROR TO

COUNTY COURT,

COOK COUNTY.

1941 A. 608

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On August 30, 1913, W. D. Johnson, plaintiff, brought suit in the County Court of Cook County against Myer Janowitz, defendant, to recover money alleged to be due on ten promissory notes aggregating the sum of \$500. The notes were for \$50 each, were dated October 26, 1911, were signed by the defendant and were payable to the order of the plaintiff. The first note matured on January 1, 1912, and the others matured at monthly intervals thereafter, the last note being due on October 1, 1912. All of the notes bore interest at the rate of six per cent. per annum after maturity. To plaintiff's declaration the defendant filed a plea of the general issue and a special plea. In the latter plea defendant alleged that the supposed notes were given in part payment to one Carl Berfler for a one-half interest owned by said Berfler in a certain business; that said Berfler, as an inducement to defendant to buy said interest, represented to defendant that said business was paying well, that defendant, relying upon said representations, paid \$200 in cash for said interest and executed said ten notes, aggregating \$500; that at the time of said purchase said business was not paying well, etc.; that plaintiff is merely the "nominal holder" of said notes and took the same with notice of all matters in this plea stated;

1880 - 1881

1880 - 1881

1882 - 1883

1884 - 1885

1886 - 1887

1888 - 1889

1890 - 1891

1892 - 1893

1894 - 1895

1896 - 1897

1898 - 1899

1900 - 1901

1902 - 1903

1904 - 1905

1906 - 1907

1908 - 1909

1910 - 1911

and that the consideration upon which said notes were made has wholly failed. The cause was tried before a jury on March 24, 1914. At the conclusion of all the evidence the court instructed the jury to find the issues for the plaintiff and to assess plaintiff's damages at the sum of \$530, and the jury accordingly returned such a verdict. On April 4, 1914, judgment was entered upon the verdict, which judgment the defendant by this writ seeks to reverse.

We have carefully examined the transcript of the record in this case and are of the opinion that the trial court was fully warranted in instructing the jury as above stated and in entering the judgment. No useful purpose will be served by a discussion of the evidence. Suffice it to say that it was clearly shown that the notes were executed by the defendant and for a valuable consideration; that the defendant was not induced to sign said notes by reason of any false representations on the part of Berfler or plaintiff; and that the consideration for said notes had not wholly failed. The judgment of the County Court is affirmed.

AFFIRMED.

194/609

230

DEC 5 1915

493 - 20825

MORRIS BAYOFSKI, by BENJAMIN
BAYOFSKI, his next friend,
Appellee,

vs.

MORRIS ROSENBERG and NATHAN D.
ROSENBERG,
Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

18-1A-309

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On June 24, 1912, Morris Bayofski, by his father as next friend, commenced an action in the Superior Court of Cook County against Morris Rosenberg and Nathan D. Rosenberg, defendants, to recover damages for personal injuries sustained by him and occasioned by his falling from a porch to the sidewalk below, a distance of about 25 feet. At the time of the accident, which occurred early in the evening of December 31, 1911, plaintiff was of the age of five years. On May 13, 1914, the jury returned a verdict finding the defendants guilty and assessing plaintiff's damages at the sum of \$1,500, upon which verdict the court entered judgment, and the defendants appealed.

It was alleged in plaintiff's declaration in substance that on and prior to December 31, 1911, the defendants were the owners of a three-story apartment building situate on the southeast corner of West Taylor and Laflin streets in the city of Chicago; that as such owners they had control of a certain porch or platform, and stairway and railing appurtenant thereto, which formed a means of exit and entrance to the apartments in the building, which apartments were leased by defendants to various persons; that the father of plaintiff, Benjamin Bayofski, was

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the lessee of, and with his family occupied, the rear flat on the second floor; that said porch or platform and stairway and railing were used in common by said Benjamin Bayofski and his family, together with other tenants in said building, as a means of entrance and exit from the second and third floors of said building; that it was the duty of the defendants to keep the same in a reasonably safe condition; that they negligently permitted the same to become and remain in a bad and unsafe condition and out of repair, of which condition the defendants had knowledge or by the exercise of reasonable care might have had knowledge; that on the day aforesaid said railing was rotten, loose and unfastened, and while plaintiff, who was in the exercise of due care, was upon said porch on said second floor, and standing near or against said railing, the same gave away and plaintiff fell, or was thrown, from said platform to and upon the ground and sidewalk beneath, a distance of 20 feet or more, and thereby his head and body were lacerated and bruised and he was otherwise greatly injured, etc.

To this declaration the defendants filed a plea of the general issue. By the filing of this plea the questions whether the defendants were the owners of the building and had control of said porch or platform and stairway and railing were not put in issue. (Chicago Union Traction Co. v. Jerka, 227 Ill. 95; Morris v. Williams, 143 Ill. App. 140; Thomas v. Anthony, 261 Ill. 288, 291; Carlson v. Johnson, 263 Ill. 556, 560.)

It is contended that the negligence of the defendants as charged in the declaration was not sufficiently established. It appears from the evidence that the building fronted north on West Taylor Street and ran back along the east side of Laflin street for a distance of about 75 feet. In the rear of the building there were three platforms or porches, one for each floor, about seven feet wide, running the entire width of the rear of the

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building. The stairs to each of these porches rose from the westerly or Laflin street side, and the top landing of each flight of stairs was about 25 feet from the west end of each porch. The porches and stairs were used in common by all the tenants, including the Bayofski family, who lived in the rear apartment on the second floor. The railing in question was on the second floor porch at the Laflin street end thereof. It was an ordinary porch railing, constructed of wood, three and one-half to four feet high, with a top board and small perpendicular palings with spaces between. It was even with the west line of the building and at its inner end was fastened to the building and at its outer end to an upright post or column which supported the porches. The testimony of several of plaintiff's witnesses tended to show that plaintiff was leaning against and over the railing when the entire west end thereof gave way and plaintiff and the railing fell to and upon the sidewalk on Laflin street. One witness for the defendants, a helper in a blacksmith's shop directly across Laflin Street, testified that he saw the child climb upon the railing and fall to the ground, saw persons carry the child away and then, in about eight minutes, saw a man "push the railing with his side * * and it fell over." The testimony was conflicting on the questions whether the defendants had actual or constructive notice of the unsafe and defective condition of the railing. We cannot say that the verdict of the jury, as to the negligence of the defendants, is not supported by the evidence.

It is also contended that the court admitted certain improper evidence and erred in giving and refusing to give certain instructions. We do not think that the court committed any error in these particulars which justifies a reversal of the judgment and the remanding of the cause.

It is further contended that the damages awarded by the

jury are excessive. It appears from the evidence that after the accident the child was taken to a neighboring drug store in an unconscious condition and there examined and treated; that his head was cut and lacerated and that there was a slight fracture of the skull; that he was taken to a hospital, where he remained eight days, after which he was brought home; and that three or four weeks after the accident, and subsequently, several neighbors saw him playing around as usual and in apparent good health and condition. Miss Ryan, his public school teacher at the time of the trial, testified that for about a year he had been very regular in his attendance and that his health and condition appeared to be good. We think that the verdict of \$1,500 is excessive. If the plaintiff will file within ten days a re-mittitur in the sum of \$750, the judgment will be affirmed for \$750, otherwise the judgment will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR.

WILLIAM S. DOUGLAS,
Appellant,

vs.

WILLIAM E. DEE,
Appellee.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

194 I.A. 612

STATEMENT OF THE CASE. The plaintiff, William S. Douglas, commenced an action against William E. Dee before a justice of the peace in Cook County. Judgment was rendered for \$200 against the defendant and he prayed an appeal to the Circuit Court of Cook County and filed his appeal bond which was approved by the justice. On September 10, 1913, the appeal bond and the justice's transcript were filed with the clerk of said Circuit Court. The case was placed on the short cause calendar and on April 9, 1914, came on for trial before a jury, who returned a verdict finding the issues for the plaintiff and assessing his damages at the sum of \$240. The defendant moved for a new trial and also moved that the court dismiss the suit for want of jurisdiction. Both motions were allowed and on April 25, 1914, the court dismissed the suit for want of jurisdiction and entered judgment against the plaintiff for costs, and plaintiff prayed and perfected this appeal.

On the trial in the Circuit Court plaintiff's evidence disclosed that defendant in May, 1913, was engaged in selling motor trucks; that plaintiff sought employment with defendant as a salesman to sell defendant's trucks; that it was agreed that plaintiff was to sell each truck so that the sale would net defendant the sum of \$1,550 and that any amount received over said sum from the sale of any truck would be paid to plaintiff; that some time during the month of June, 1913, plaintiff

called on John A. Mulvihill of the firm of Mulvihill & Sons and endeavored to sell him a truck but did not consummate the sale; that during July, 1913, one Phillips, another salesman of defendant, sold Mulvihill & Sons one of defendant's trucks for the sum of \$1,875, and defendant afterwards received the purchase price thereof and paid Phillips a commission for making the sale. Plaintiff testified that he first called Mulvihill's attention to defendant's truck and that he quoted a price of \$1,875 therefor to Mulvihill. Plaintiff claimed that he was entitled to the difference between \$1,875 and \$1,550, or the sum of \$325, and further testified that said sum "is the commission that I am suing to recover," no part of which had been paid to him.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is contended by counsel for plaintiff that the trial court erred in dismissing plaintiff's suit for want of jurisdiction and entering judgment against plaintiff for costs.

The first paragraph of section 16 of the "Justices and Constables Act" provides in part that justices of the peace shall have jurisdiction in their respective counties, "when the amount claimed does not exceed two hundred dollars," in actions arising on contracts, express or implied, for the recovery of money only. "Upon an appeal from a justice of the peace to the circuit court, the case is to be tried de novo, upon the proofs offered by the respective parties, without written pleadings, the circuit court having no other or more extensive power or jurisdiction in disposing of the case than the justice had who tried it below." (Dodge v. People, 113 Ill. 491, 496.) "On the appeal it is the duty of the court to hear the evidence, without reference to the justice's

docket, and to render judgment in the case, unless from the evidence it appears the justice had no jurisdiction of the subject matter. Rogers v. Blanchard, 2 Gilm. 335; Ballard v. McCarty, 11 Ill. 501; Vaughan v. Thompson, 15 Ill. 39. And by the construction given the statute by these decisions, the court below had no power to determine whether the justice had jurisdiction of the subject matter of the suit, until the evidence was heard. * * And it was error to dismiss the suit for want of jurisdiction in the justice, until the evidence was heard." (Swingley v. Haynes, 22 Ill. 214, 216.) In Village of Hammond v. Leavitt, 181 Ill. 416, 420, it is said: "The want of jurisdiction over the person may be waived, but jurisdiction over the subject matter cannot be conferred upon the court by consent of parties; and, therefore, the want of it cannot be waived by either party. Leigh v. Mason, 1. Scam. 249; Deesman v. City of Peoria, 16 Ill. 424; Peak v. People, 71 id. 278. The objection to the jurisdiction may be taken by motion to dismiss the suit, as well as by plea; and a motion to dismiss for want of jurisdiction in the court to take any action at all may be made at any time." In People v. Skinner, 13 Ill. 287, it appeared that, at a time when the maximum of a justice's jurisdiction was \$100, McClintock sued Smith before a justice of the peace and recovered a judgment against Smith for \$62.50; that on the appeal in the Circuit Court a jury returned a verdict in favor of McClintock for \$130.62; that on the coming in of the verdict McClintock entered a remittitur for \$30.62; that Smith made a motion in arrest of judgment which was overruled, and that the court, on its own motion, set aside the verdict and continued the cause; that McClintock then moved for a judgment for \$100 and costs, which motion was denied, and he applied to the Supreme Court for a peremptory mandamus to compel the circuit

[illegible]

judge to enter judgment on said verdict for \$100. In refusing the application for the writ the court said (p.288): "The maximum of the justice's jurisdiction was \$100. The result of the first trial showed, prima facie, that he had jurisdiction of the case. The jurisdiction of the Circuit Court was no greater than that of the justice. It is the duty of a circuit court to dismiss a suit which is before it by appeal, whenever it appears that the justice had no jurisdiction of the subject matter. * * The verdict on the second trial showed, prima facie, that the case was not within the jurisdiction of the justice. If more than \$100 was really due on the claim in controversy, the justice was without jurisdiction and the Circuit Court should have dismissed the case. It is very clear that the plaintiff could not confer jurisdiction by remitting a portion of the verdict. The remittitur did not determine that but \$100 were actually due." In Reading v. Mead, 16 Ill. App. 360, an assumpsit suit was brought in the County Court by the Meads against Reading. On the trial before the court without a jury the court found in favor of the plaintiffs for the sum of \$1,145.50, which sum was in excess of the jurisdiction of the court to the amount of \$145.50. After the finding plaintiff's counsel remitted said amount therefrom and judgment was entered for \$1,000. The Appellate Court in reversing the judgment said (p. 361): "In such a case as this, the question whether or not the sum in question exceeds that of which the court has jurisdiction must be ascertained from the evidence. When the evidence is all in, and it fairly tends to show a claim in excess of the jurisdiction of the court, then, before the case is submitted either to a court or jury, is the time for the plaintiff, if he has not done it before, to disclaim all right to recover any more than the sum in his ad damnum. It is perfectly plain, upon principle, that if the plaintiff fails to so disclaim, and submits

his case, when the evidence fairly tends to show a claim beyond the jurisdiction of the court, he is submitting his case to a tribunal which has no legal authority to decide it. For that reason a remittitur after verdict or the announcement of the finding of the court, will not do, and cannot make such verdict or finding within the jurisdiction of the tribunal." (See, also Hemmingway Co. v. Reagle, 181 Ill. App. 5, 9.)

In the instant case the evidence clearly shows that plaintiff's claim for commissions due was in excess of the sum of \$200, which is the limit of the jurisdiction of the justice before whom the case was originally commenced. The jury returned a verdict for \$240 in plaintiff's favor. It does not appear that at any time in the court below the plaintiff disclaimed the right to recover any more than the sum of \$200. Under the facts of this case and the authorities above mentioned we are of the opinion that the trial court did not err in dismissing the suit for want of jurisdiction. And the judgment against the plaintiff for costs was proper. (Kinman v. Bennett, 1 Scam. 326.)

The judgment of the Circuit Court is affirmed.

AFFIRMED.

FRANCES MIKLASZEWSKI,
Appellee,
VS.
CITY OF CHICAGO,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

1941A. 614

STATEMENT OF THE CASE. On January 5, 1911, about two o'clock in the afternoon, Frances Miklaszewski, plaintiff, was walking on the sidewalk on the east side of Morgan street, between 31st street and 31st place, in the city of Chicago, when she slipped and fell, breaking her left arm. After filing a written statement on June 5, 1911, with the city attorney and the city clerk, as required by statute, she commenced suit, September 5, 1911, against the City of Chicago to recover damages.

Plaintiff's declaration consisted of two counts. It was alleged in the first count that prior to January 5, 1911, large quantities of snow had fallen upon Morgan street and the sidewalks adjacent thereto; that agents and servants of the City, in removing the obstructions of snow and ice from Morgan street, had caused large quantities of snow to be deposited in a vacant lot east of said east sidewalk on Morgan street, and had caused the same to be piled to the height of five feet above the level of said sidewalk; that the snow so piled, in melting, flowed over said sidewalk and became frozen thereon and thereby said sidewalk was rendered dangerous and unsafe, and "was obstructed for public travel," all of which conditions the City well knew or in the exercise of reasonable care would have known in time to have remedied the same before the happening of the accident; that plaintiff, while walking

upon said sidewalk and exercising due care for her own safety, on January 5, 1911, "was caused to slip, stumble and fall upon said sidewalk by means of the accumulation and obstruction of ice aforesaid," and plaintiff was severely and permanently injured, etc. It was alleged in the second count that the City, through its agents and servants, so carelessly and negligently conducted the business of removing said obstructions of snow and ice from Morgan street that thereby said east sidewalk "became so obstructed with accumulations of snow and ice that the said sidewalk was made dangerous and unsafe and was obstructed to public travel thereon," all of which conditions the City well knew in time to have remedied the same before the happening of the accident; that plaintiff, while walking over said sidewalk on the day aforesaid and while exercising due care, etc., was caused to slip, stumble and fall, "by means of the accumulation of ice and snow upon said sidewalk and the obstructed condition of said sidewalk," and was severely and permanently injured, etc. The City filed a plea of the general issue.

On the trial plaintiff testified: "I was just about to cross from the sidewalk to the street when I fell, and I tried to raise myself and I could not. I noticed it was ice under me. I had snow on my shawl. * * The officer picked me up and carried me from there home. * * He had a slight snow fall in the afternoon. The snow covered the ice, and I did not notice that there was any danger." Mrs. Frances Moritz, a witness for plaintiff, testified that she saw plaintiff fall on said east sidewalk, opposite a vacant lot; that there was a pile of snow, about four feet high, in said lot and immediately east of the sidewalk, which the City had dumped there about two weeks before the accident; that during the day the snow would melt and run down on the sidewalk; that towards evening it would freeze and the sidewalk would

be slippery; that at the time plaintiff fell the sidewalk was slippery and icy there, and it was snowing and the sidewalk was covered slightly with snow; that the sidewalk was a good, cement sidewalk; that "there never was a time when it was not smooth, either before the snow melted or after the snow melted"; that the accident happened on January 5, 1911, between 2 and 3 o'clock in the afternoon; that during the preceding day the temperature was above freezing and it was melting; that it had started to freeze early on the morning of January 5th, then it had gotten warmer and then about 12 o'clock it had gotten colder again and had started to snow. Other witnesses for plaintiff testified that there was a pile of snow in said vacant lot, which snow had been taken from the street and put there by the City about two weeks before the accident. The daughter of plaintiff testified that prior to the accident water from the melting snow pile had run down upon the sidewalk and had frozen, and that this left the sidewalk "smooth like this table," and then snow had fallen upon the sidewalk. At the close of plaintiff's evidence and again at the close of all the evidence counsel for the City moved for a directed verdict in its favor but the motions were both denied.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is contended by counsel for the City that the court erred (1) in refusing to instruct the jury to find the City not guilty, (2) in admitting improper testimony on behalf of plaintiff, (3) in giving certain instructions offered by plaintiff, and (4) that the verdict and judgment are excessive. In the view we take of this case it will be necessary for us to consider only the first contention.

Both counts of the declaration charged that the sidewalk at the place where plaintiff slipped, fell and was injured

The following are the names of the persons who have been appointed as members of the committee:

- (1) Mr. J. H. Smith
- (2) Mr. W. B. Jones
- (3) Mr. C. D. Brown
- (4) Mr. E. F. Green
- (5) Mr. G. H. White

The committee will meet at the office of the Secretary on Monday next.

"was obstructed for public travel." The evidence, however, does not show that there was any obstruction to travel beyond the fact that the sidewalk was slippery because of ice recently formed thereon, and which ice was covered by a thin coating of snow which had recently fallen. "The mere slipperiness of a sidewalk, occasioned by ice or snow, not being accumulated so as to constitute an obstruction, is not such a defect as will make the city liable for damage occasioned thereby." (City of Chicago v. McIlven, 73 Ill. 347, 338; Village of Gibson v. Johnson, 4 Ill. App. 288; City of Aurora v. Parks, 21 Ill. App. 459; City of Quincy v. Barker, 21 Ill. 300, 304; Metzger v. City of Chicago, 103 Ill. App. 609, 608; City of Chicago v. Mc Donald, 111 Ill. App. 436; City of East Dubuque v. Brugger, 118 Ill. App. 421, 423.) In the Barker case, supra, it is said: "It is utterly impracticable for a city or incorporated town at all seasons of the year to keep streets and sidewalks free and clear from ice; and should the incorporation be held liable for every accident that might occur from an obstruction of this character, the result might be to bankrupt every incorporated town in the State." In the Metzger case, supra, it is said: "It is clear that the ice in question did not 'obstruct' the walk. It rendered more care necessary in passing over it, but it was clearly not an 'obstruction' in any sense of the word." The rule stated in the McIlven case, supra, "applies to cases where the presence of the ice or snow causing such slippery condition is due to artificial as well as natural causes." (23 Cyc. 1374; the Metzger case, supra, p. 607; Nason v. City of Boston, 14 Allen 508, 510; Henkes v. City of Minneapolis, 42 Minn. 530; Thase v. City of Cleveland, 44 Ohio St. 505, 514; Kaveny v. City of Troy, 108 N. Y. 571, 577.) And, under the facts of this case and under the authorities cited, we do not think that the City, in piling snow in said vacant lot opposite and east of the place on said sidewalk where

plaintiff slipped and fell, was guilty of such negligence as renders it liable to plaintiff for the injuries sustained by her. We are of the opinion that she is not entitled to recover and that the trial court erred in not instructing the jury to find the City not guilty, and in not entering judgment in its favor. The judgment of the Superior Court will be reversed.

REVERSED.

Finding of fact. We find as an ultimate fact in this case that the injuries to the plaintiff, Frances Miklaszewski, were not caused by the negligence of the defendant, City of Chicago.

531 - 20864

CLAF NELSON,

Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM

CIRCUIT COURT,

Cook County.

194 I.A. 615

STATEMENT OF THE CASE. This is an action to recover damages for personal injuries sustained by Claf Nelson, plaintiff, by being struck by an electric street car of the Chicago City Railway Company on Wentworth avenue in the city of Chicago, about 7 o'clock on the evening of January 2, 1903. The cause was first tried in July, 1903, resulting in a verdict and judgment for the defendant. Plaintiff appealed to this court and the judgment was reversed and the cause remanded for a new trial because of errors in the instructions. (Nelson v. Chicago City Ry. Co., 163 Ill. App. 98.) The cause was again tried in June, 1914, resulting in a verdict and judgment in favor of the plaintiff for \$5,500, which judgment the defendant by this appeal seeks to reverse.

Wentworth avenue is a north and south street. North bound cars of the defendant are run over the east track and south bound cars over the west track. 47th street is about a half mile north of 51st street, and these streets cross Wentworth avenue at right angles. Between these streets are two other streets - 48th place and 50th street, which run into from the west but do not cross Wentworth avenue. Practically all the land fronting on the east side of Wentworth avenue, from 47th street to 51st street, is occupied by the Chicago, Rock Island and Pacific Railroad Company and is enclosed by a high board fence which extends the entire length of the frontage. On the west side of Wentworth avenue there is a 14-foot sidewalk. The distance from the west curb to the west rail

of defendant's east or north bound track is 37 feet, and the space between the two tracks is 5 feet. The distance from the south line of 47th street to the north line of 48th place is 1,048 feet. At a point on the west side of Wentworth avenue, 481 feet north of the north line of 48th place, is located a "stop-ball" post, to indicate that defendant there stops its cars to receive or discharge passengers. At the time of the accident it was dark and rain mixed with snow was falling. There were no street lights on the east side of Wentworth avenue between 47th and 51st streets, but on the west side of said avenue there were two lights between 47th street and 48th place and one at 48th place, and others at intervals further south.

Plaintiff's original declaration, filed September 10, 1903, and upon which the cause was first tried, consisted of one count, to which the defendant pleaded the general issue. It was charged in substance in said count that at a public crossing on Wentworth avenue, about 440 feet north of 48th place, which crossing was used as a public highway, there was located a regular stopping place for defendant's cars; that while defendant by its servants was driving a motor car upon and along Wentworth avenue, at or near the intersection of said avenue and said public crossing, and "while plaintiff with all due care and diligence was attempting to cross the said line of street cars on said public crossing on the said public highway there," the defendant, by its servants, "so carelessly, negligently and improperly drove and managed said motor car that * * said motor car then and there ran and struck with great force and violence upon and against plaintiff," who was thrown to the ground and severely and permanently injured, etc. After the reversal of the first judgment and after the cause had been re-docketed in the Circuit Court, plaintiff, by leave of court, on October 2, 1913, filed an additional count, which contained substantially the same allegations as in the original count.

Plaintiff is a native of Sweden, a tailor by trade, and at the time of the accident was about 35 years of age and resides on

[illegible]

Princeton avenue near 32nd street. He had lived in Chicago for 14 years prior to the accident, during which time he was accustomed to ride in street cars, and was familiar with Wentworth avenue and with the manner in which the cars were there operated. He did not work on New Year's day or on the day of the accident. During the afternoon of January 2nd, he went in company with Bernard Johnson to the home of Andrew Johnson, at 4912 5th avenue. About 6 o'clock Bert Johnson arrived there after his day's work and the four there had supper. Shortly before 7 o'clock plaintiff and the three Johnsons left the house, plaintiff intending to go to his home and the others to a lodge meeting at the corner of 31st street and Cottage Grove avenue. They walked north on 5th avenue to 48th place, thence east on the south side of 48th place to Wentworth avenue. Their object in going to Wentworth avenue was to there take a north bound car. Plaintiff was a witness in his own behalf, and the three Johnsons testified as witnesses for him. Their version of what subsequently transpired is substantially as follows: Upon reaching Wentworth avenue and not seeing a north bound car coming, they walked north on the west side of Wentworth avenue, intending to take a car at the stop-ball or at 47th street. Bert and Bernard Johnson were in the lead walking side by side, and plaintiff and Andrew Johnson followed a few feet behind. When the two who were in the lead had arrived within a few feet of the stop-ball one of them looked, saw a north bound car coming and advised the others of that fact, and all of them looked south and saw the on-coming car. Bert Johnson, who is the brother of Bernard, testified in part as follows:

"When I started to cross Wentworth avenue to get on the east side of the street I crossed slantways about four feet or so south of the stop-ball, then me and my brother walked across first. * * When I got over I made an effort to signal the car. I put up my hand. * * As I signaled the car to stop Nelson and Andrew Johnson were stepping off the west curb. * * I walked across the street at an ordinary walk. * * The car didn't slacken its speed at all as it came up to the stop-ball. * * There was a few on the platform standing up. The car was going about 30 miles an hour. * * The car went after it struck Nelson be-

fore it was stopped about three car lengths. The car was about 50 feet in length. I didn't hear the ringing of any bell or sounding of any gong as the car came along. * * After the car went by Nelson was laying on the south-bound track near the west rail, head facing to the north * * . Me, Andrew Johnson and my brother helped pick him up. * * He was unconscious. * * Andrew Johnson came across after me and my brother. He was the third man across and Nelson was behind him a little. I didn't notice how much. * * I don't remember whether Nelson was running at the time that Andrew Johnson crossed the north-bound track. He jumped the front of the car on the west side of it, and was thrown on the southbound track. * * He got thrown kind of northwest. * * There was a fender sticking out in front of that car. * * I didn't see any fender touch him."

Bernard Johnson testified in part as follows:

"When we got across the street, and over the north-bound track, my brother signaled the car by raising his hand. When he did so the car was about 48th place. * * The car didn't slacken up at all as it came along. It was going fast. * * It was lighted up. * * From the time I started to cross the street until the car came along I didn't observe any south-bound car. * * There wasn't any traffic there to bother us in the way of horses or wagons or anything, and there was no obstruction to the view."

Andrew Johnson testified in part as follows:

"The Johnson brothers started first to go across the street. * * We walked slowly over and I did not hear the car do anything; there was no sound whatever; when I came in the middle of the north-bound track I looked up and the car was right there, pretty near; and I hollered back to Nelson a warning, to look out, and I took a jump over the track because I saw the car wasn't going to stop then. I jumped over the track and the car barely missed my coat, I felt that; and then I heard a thud, like you get struck, and he was struck. * * When I saw the car coming it was lighted up. * * We all knew the car was coming. * * There was no obstruction whatsoever to our view of the north-bound car coming. * * I saw it perfectly plain, and if there was any south-bound car it was where it did not obstruct my view any."

Plaintiff testified on direct examination in part as follows:

"Bernard and Bert started to cross Wentworth avenue first. * * After they got across the tracks I saw Bert Johnson hold his hand up to stop the car. * * We were stepping off the curb at that time. * * Just as I stepped off the curb the car was north of 48th place, how far north I don't know. I thought I had time enough to cross in front of the car. How fast the car was going I do not know exactly. It was running, I think, as fast as it could. It was going fast. * * Andrew and me were walking over. We thought sure that the car would slack up. We knew we had plenty of time to get over if it slacked up a little bit; so, when we were just in the middle of the track on the east side there the car came so fast that we could not get over. The car did not slack up at all. Andrew Johnson was with me. He said, 'the car

is coming,' so he ran. He took a quick step that way. I could not get over because he was a little bit ahead of me then, and I could not get back again either, because I was right in the middle of the track there where the car was coming. I could not go nowhere. Then I was struck. I don't remember anything else that happened that night. I did not hear any bell ring or gong sound."

On cross-examination plaintiff further testified:

"I left the curbstone about four or five feet from the stop-ball. * * We were still south of it. When I stepped into the street I went straight east. * * I saw the car coming. * * It was coming very fast, and I knew it was coming fast. * * When I was crossing the west track, the first track, I saw the front of the car and it was about 150 feet from me. * * The man that was with me was Andrew Johnson. He crossed over before I did and his coat tail brushed the car. We was walking together until we came on the track and then the car did not slack up any. I was the last man to go over.

Q. Knowing it was not slacking up any, what made you try to cross then, if it did not slack up any?

A. We was in the middle of the track by that time, the two of us.

Q. How did you come to go so far as the middle of the track; why didn't you stay back and let the car go by?

A. We didn't know the car was coming that fast. We couldn't get over.

Q. What did you take chances for, whether it was coming fast or not; why didn't you wait and let it go by?

A. Because we thought for sure we had time to get over, if it was slacking up. * * But it wasn't slacking up any, it was running fast and I couldn't get over.

Q. When you went out toward the track and saw the car coming you knew that if it did not slack up its speed and you kept on you would be struck, didn't you?

A. Why, sure. * * I expected the car to slack up."

The motorman of the north bound car and four passengers who were standing on the front platform of the car at the time of the accident were witnesses for the defendant. Their testimony was to the effect that shortly before the car reached the stop-ball it passed a car going south and that they then saw four men, 20 or 25 feet in front of them, running towards the east; that three of them got safely across the tracks, although the last of the three barely escaped being struck; that the fourth man did not get onto the east track but ran into or was struck by the northwest corner of the car near the vestibule door; that the north bound car was running at a speed not to exceed 12 miles per hour; that they did not see anyone standing east of the track and signaling the car to stop as it approached the stop-ball; and that as soon as the men

running east were discovered the motorman turned off the power and applied the brakes. It is evident that plaintiff had not reached the center of the north bound track when the car struck him, because neither his legs nor any portion of his body below the waist were injured. He was, however, severely injured on the head.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is urged by counsel for defendant (1) that the verdict is not justified by the evidence in that the testimony shows that plaintiff was guilty of negligence which proximately contributed to his injuries, (2) that the verdict is against the manifest weight of the evidence, (3) that the court erred in giving two instructions offered by plaintiff, and (4) that the verdict is excessive. In the view we take of this case it is only necessary for us to consider counsels' first point.

We are of the opinion that plaintiff was guilty of such contributory negligence as precludes a recovery by him. It appears from his own testimony that when he stepped off the curb, about four or five feet south of the stop-ball, and went straight east, he saw the car coming; that when he reached the west track he saw the front of the car and that it was still coming fast; that he thought he had time to get over if the speed of the car was slackened; that he expected the car to "slack up"; and that he knew if the speed of the car was not checked and he kept on he would be struck. It thus appears that with full knowledge of the conditions and the danger he took his chances, with the result that he was struck by the car and severely injured. Under all the facts as disclosed by the present record and under the law as stated in many adjudicated cases in this state he was not in the exercise of due care for his own safety but was himself guilty of negligence. (Bale

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v. Chicago Junction Ry. Co., 239 Ill. 476, 478; Roberts v. Chicago City Ry. Co., 262 Ill. 228, 231; Smith v. Chicago General Ry. Co., 86 Ill. App. 647, 649; O'Hern v. Chicago City Ry. Co., 151 Ill. App. 208, 213; Button v. Aurora, etc., Ry. Co., 186 Ill. App. 299, 305; Healy v. Chicago City Ry. Co., 187 Ill. App. 524, 525.)

The judgment of the Circuit Court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

FINDING OF FACT. We find as an ultimate fact that the plaintiff, Olaf Nelson, was guilty of negligence which contributed to his injuries.

THE UNIVERSITY OF CHICAGO
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DEPARTMENT OF CHEMISTRY
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RECEIVED 10/10/98

TO: DR. J. K. STILLE
FROM: DR. J. K. STILLE
SUBJECT: 10/10/98

539 - 20872

ROSINA DE BENIO and ANGELINA
DE BENIO,

Appellees,

vs.

CATHOLIC ORDER OF FORESTERS,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

1941A. 616

MR. ANNALINO JUSTICE CHIEFLY DELIVERED THE OPINION OF THE COURT.

This was an action of the first class brought in the Municipal Court of Chicago upon a benefit certificate for \$2,000, issued August 21, 1902, to Francesco De Benio by the Catholic Order of Foresters, a fraternal beneficiary society. The amount of the certificate was payable upon his death while a member in good standing of the society to "Rosina De Benio and Angelina De Benio, his wife and daughter." At the time of his admission as a member one Domenica De Benio was his lawful wife, but he was not living with her. At that time he and one Rosina De Benio were, and had been since about the year 1890, living together as husband and wife, the latter knowing that Domenica De Benio was the wife of the former. On March 3, 1909, Francesco De Benio obtained a decree of divorce in the Circuit Court of Cook County from said Domenica De Benio. On June 16, 1910, he obtained a license from the County Clerk of said county to marry said Rosina De Benio, and on June 21, 1910, they were married, and they continued to live together until his death on December 28, 1912. He was continuously a member of the society from the time of his admission until his death, he having paid all dues, etc. The society refused to pay the amount of the certificate to the beneficiaries named therein, and this suit was commenced. The cause was tried before the court without a jury. It was stipulated

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that proofs of death had been duly made, and that if plaintiffs were entitled to recover at all they were entitled to recover the amount of the certificate and \$100 interest, in all the sum of \$2,100. The court found the issue in favor of plaintiffs and assessed their damages at the sum of \$2,100, upon which finding judgment against the society was entered.

The defense of the society, as stated in its affidavit of merits and as made upon the trial, was substantially as follows: That at the time Francesco De Benio applied for membership in the society there was in full force a by-law of the society to the effect that any male person "of good moral character and exemplary habits," and who "is a practical Roman Catholic," shall be qualified to be proposed for regular membership in the society; that Francesco De Benio prior to his admission signed an application for membership in which it was stated that he was fully acquainted with the objects of the society, that he was not a member of any organization which was condemned by the Catholic Church, and that he was a practical Roman Catholic; that it was further stated in said application that "I direct in case of my decease that all benefit to which I may be entitled * * shall be paid to \$1,000 Rosina - Angelina \$1,000 each dependent upon me as the first my wife & second my daughter," and that "I do hereby consent and agree that any untrue or fraudulent statement made above, * * or any concealment of facts by me in this application, or my suspension or expulsion from or voluntarily severing my connection with the order, shall forfeit the rights of myself and my family, or dependents, to all benefits and privileges therein"; that at the time Francesco De Benio applied for membership, and was admitted as a member of the society he was not a person of good moral character and was not a practical Roman Catholic, in that he was then married to said Domenica De Benio and was living in an open state of adultery with said Rosina De Maio, of which facts the

defendant society had no knowledge until after the death of said Francesco De Benio; that the statement in said application that said Rosina was dependent upon said Francesco De Benio as his wife was false and was material to the risk; and that by reason of the foregoing the society is not liable to plaintiffs upon said certificate. It is here contended that the trial court erred in entering a judgment in any amount against the society.

Under the facts and circumstances disclosed in this record we are of the opinion that the judgment should be affirmed. In 29 Cyc. 121, it is said: "A statement of the relation that the beneficiary bears to the member is regarded as descriptive personae, so that its falsity does not invalidate the designation if the beneficiary is eligible as such." See, also, Burian v. Central Verein, 7 Daly (N.Y.) 166; Starr v. Williamsburgh, etc., Association, 95 N. Y. 474; Jones v. Supreme Council, 120 Fed. Rep. 1014; Supreme Lodge v. Hutchinson, 6 Ind. App. 329. Furthermore, it was not denied that at the date of the death of Francesco De Benio, December 26, 1912, plaintiffs, who were named as the beneficiaries in the certificate, were respectively his wife and daughter. The proof showed that he and Rosina were lawfully married about two and one-half years prior to his death, and that he remained a member of the society in good standing until his death. In 29 Cyc. 106, it is said: "where a person's eligibility as a beneficiary depends upon his sustaining a particular relation to the member, his eligibility is generally determinable as of the time of the member's death." See, also, Supreme Lodge v. Menkhause, 126 Ill. App. 665, 669; Kirkpatrick v. Modern Woodmen, 103 Ill. App. 469, 473.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

\$500, and interest, on said note No. 2, and of \$1,000 on each of said other three notes is predicated upon a certain check (complainant's exhibit 4) for \$3,505, dated September 5, 1912, signed by Aranoff, payable to the order of "Adolph Major" and drawn on said Colonial Bank. The check was introduced in evidence. It has stamped in the upper left hand corner the words: "Your endorsement will be considered a receipt in full for account as stated below." On the face of the check also appear the following words in writing in the lower left hand corner: "Five hundred and five dollars (\$505) in full payment of note #2, and interest to date on four notes, and three thousand dollars (\$3000) to be applied as follows: one thousand dollars (\$1000) on each note, #3, #4, #5, leaving balance of five hundred dollars (\$500) on each note, or total due on the three notes \$1500." The check is not numbered. On the back appears the endorsement "Adolph Major," and underneath "O.K., M. Aranoff." Early in the hearing before the master Major testified that the signature "Adolph Major" on the back of the check "looks like mine, but it is not," but as the hearing progressed, as stated by the master in his report, "it was tacitly if not actually admitted that this was Major's signature, and such is undoubtedly the fact." Major further testified that on July 2, 1912, when he received at the Colonial Bank from Aranoff said checks of \$165 and \$1,000, Aranoff requested him to sign his name on the back of three pieces of paper, which he did although he did not see the face of the papers, and that Aranoff took the papers from him and soon brought back the money, \$1,165, and gave it to him. These two checks, with Major's endorsement thereon, were introduced in evidence, but what became of the third piece of paper then endorsed by Major, as he says, does not appear. It was urged before the master and is here contended that in this manner Major's signature was obtained on the back of said check for \$3,505.

The defendant, Adolph Major, further testified as follows:

"I live at 6343 Washington Avenue, Chicago. I will be 73 years old next March. * * The way I came to go to the Colonial Bank on September 5, 1912, was that Mrs. Aranoff, wife of complainant, came to me the day before and told me to be there sharp * * at 11 o'clock. She said Mr. Aranoff started in the morning early about five o'clock, suddenly, and he could not meet me at the bank, but his brother (Meyer Aranoff) would be there, and that his brother didn't know me, but her sister would be there to identify me. On September 5th I went to Mr. Barsaloux' office, and we came down together to the bank, expecting to get \$3,500. I brought all my notes with me to the bank, and I handed them to Barsaloux. Aranoff's brother was there, a young man, and he took out of a big, white envelope four bills of \$100 each and two \$50 bills and one \$5 bill, and handed them to me, and I said 'Is that all you are going to pay?' and he said 'That is all my brother gave me.' * * After he gave me \$505, Mr. Barsaloux brought me to the Bank of Montreal, and left me there, and I took my bank book and money and * * deposited it. * * Mr. Barsaloux had the four notes and when Mr. Aranoff handed him the \$505 he took the note and marked 'paid' on it * * He handed me back the other notes, and I brought them home * * We left 63rd street at 10:20, I think. It must have been about a quarter or ten minutes to eleven o'clock when I got to the Colonial Bank. We were at the bank about five minutes. Meyer Aranoff was at the bank when we got there. Miss Arkin was there when we came in. * * She introduced us, and was there at the time the money was paid. After the money was paid we all went out together. After I left the Bank of Montreal I * * went straight home and did not go back to the Colonial Bank. * * Mr. Barsaloux was standing alongside of me during the entire time I was in the bank on September 5th. * * N. K. Aranoff never paid me anything, and nobody for him ever paid me anything, on the principal of the last three notes. * * I am the owner and holder of these notes. They have been in my possession continuously since the date they were delivered to me originally by Mr. Aranoff. When they became due, to get them paid, I put them in the bank. I gave instructions to the Woodlawn Trust & Savings Bank to collect \$1,500 on note No. 3, and the interest on the three notes."

James B. Barsaloux further testified as follows:

"I am in the real estate business at 63rd and Washington Avenue. I know both the complainant and defendant. I have known N. K. Aranoff about 12 years. I have always handled his business. I have known Major about 12 years. * * I have done business for him, too. * * Major came to my office about 5 o'clock in the afternoon. It was the day before we went to the bank. * * Major told me what was to be done. He said the understanding was that \$1,000 was to be paid on each of those notes * * That was the reason I went with him, to see that he got \$3,500. * * On September 5th we took the 10:20 train from 63rd street, * * and I know we got into the bank not later than 10 minutes to 11 o'clock, * * Mr. Aranoff's sister-in-law came in and she introduced us to a brother of Mr. Aranoff. * * We stepped over to the place where you make out your deposits, and he produced a long, white envelope, and pulled out four \$100 bills, two \$50 bills and a \$5 bill,

and * * laid them down in front of Major * * . I counted them, and I said, 'Is this all the money you have got,' and he replied 'That is all the money I know anything about.' I said 'We were to get \$3,500 here,' and he replied, 'I don't know anything about that.' I then took this note and marked across it 'Paid 9/5/1912' * * and I had Major sign it. I refer to the note for \$1,500, * * * due on or before January 2, 1912. After we got the money Major put the other notes back in his pocket, and I took him to the Bank of Montreal and left him at the door of the bank * * I never saw the check for \$3,500 (being complainant's exhibit 4) in the Colonial Bank on September 5th. I went into the Colonial Bank with Major on that date and stayed there as long as he did. * * During the time we were there Major did not sign his name on the back of said check. The assistant paying teller did not pay any money to Major while I and he were in the bank. He did not pay any money to Meyer Aranoff while I was there. * * Miss Arkin, Meyer Aranoff, Major and I, all four left the bank together. * * I went into the bank alone with Major, and from the time I went in until the time I came out he never left me for a moment * * Major did not go to the cashier's window at all, and * * Meyer Aranoff did not while I was there. * * We were not in the bank 5 minutes after these people came in."

The complainant, N. K. Aranoff, further testified in substance that he is in business in Chicago as a bookbinder; that he left the check for \$3,500 enclosed in an envelope with A. B. Arkin, an attorney with offices in the Ashland Block, on the morning of September 5th, telling Arkin of his appointment to meet Major at the Colonial Bank at twelve o'clock, and requesting him to meet Meyer Aranoff at the railroad station and give the latter said envelope and contents; that he went himself to Valpariso, Indiana, on the 11:05 A. M. train that morning, returning the next day; that the only time, after September 5, 1912, and prior to the commencement of this litigation, that he saw Major was "towards the middle of December" when he called at Major's house and offered to sell him some notes," and that he received a notice from the Woodlawn Bank to the effect that the bank had a note of his for collection about January 1, 1913, but that he did not go to the bank.

A. B. Arkin testified in substance that complainant left the check for \$3,500 in an envelope with him on the morning of September 5th; that he went to the La Salle street station about 11 o'clock, waited about 15 minutes, met Meyer Aranoff as he came in on the train, and gave him the envelope containing the check, and

that he then telephoned Miss Arkin to go to the Colonial Bank and introduce Meyer Aranoff to Major.

Mrs. Oscar Elumenthal (Miss Arkin), wife of one of the solicitors for the complainant, testified in substance that about 11:30 o'clock on the morning of September 5th she was in her husband's office when she was called on the telephone by A. B. Arkin; that after receiving the message she left the building about twelve o'clock and went to the Colonial Bank and there met Meyer Aranoff; that Meyer Aranoff was married to her cousin and that complainant was her brother-in-law; that she saw Major and Barsaloux come into the bank; that she told Major that complainant was away but that Meyer Aranoff was there to handle the matter, and that she introduced him to Major.

Meyer Aranoff testified in substance that he lived at Indiana Harbor where he was employed in the furniture and merchandise business; that he had been doing business with said Colonial Bank for 3 or 4 years; that about nine o'clock on the morning of September 5th he received a long distance telephone call from complainant; that complainant told him there was a man named Major to whom complainant had promised to give a check for \$3,505 that morning, and that complainant wanted him to come to Chicago and take care of the matter for complainant as he (complainant) was obliged to go out of town; that he accordingly took a train for Chicago about 10:20 o'clock; that he was met at the Chicago depot by A. B. Arkin, who gave him an envelope marked "Mr. Aranoff"; that he went to the Colonial Bank about 11:50 A. M.; that shortly thereafter Miss Arkin came in and introduced him to Major; and that "I said to him, 'Here is a check for \$3,505,' and he says, 'Can I get the cash?' and I said 'Yes.' * * I gave it to Major and he endorsed it and handed it over to the cashier. I saw Major sign the signature on the back of the check, 'Adolph Major.' The words 'O.K., M. Aranoff' is my signature. I put that on there after Major placed his endorsement

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George H. Commons, paying teller of the Colonial Bank, and the assistant paying teller, D. J. Stark, each testified that they saw Major in the bank on September 5, 1912, about noon. Stark testified that the amount of the check, \$3,505, was paid over to Major; that, however, he had never seen Major before that day, and that he had not seen him since that day until meeting him in the master's office. Commons testified that "M. H. Aranoff had been in about 10 o'clock this morning and said there would be a check come in later in the day for \$3,500, that he had to leave for out of town, and he said, 'You remember Mr. Major, because I have introduced you to him and you have cashed a couple of checks before. * * In case you should not remember I will have my brother identify him, and if he wants the currency it will be all right' * * I do not know to whom the money was paid. I had no conversation whatever with Mr. Major."

The master in his written report, after reviewing the evidentiary facts presented in the record, stated his conclusions in part as follows:

"The issue is one of fact purely. It is clear and undisputed that either Aranoff or Major is endeavoring to cheat the other person out of \$3,000. Did the defendant Major get the \$3,505, as alleged in the bill of complaint?

In coming to a conclusion on this question I am influenced to the greatest extent by the appearance of the witnesses, their demeanor while testifying, their general manner of conducting themselves, as well as by the many personal elements which give weight to the evidence and make convincing the impression as to its truth or falsity.

The complainant, E. K. Aranoff, and his brother, Meyer, are young, active men, strong and aggressive in their personality. They give the impression very strongly of being alert and prepared to protect their own interests in every particular. On the other hand, the defendant, Major, is an old man * * ; somewhat of an invalid * * ; by no means devoid of intelligence, yet * * easily confused and clearly not capable of handling complicated business without outside assistance. * * He shows a lack of shrewdness or intelligence that is absolutely inconsistent with the possession of acumen sufficient to carry out such a plot as is alleged by complainant. * *

It is my judgment that there was a plan evolved to defraud Major out of his money, of which procuring him to obtain the release of a trust deed by Barsaloux on Kimbark avenue, and the return to him of the notes unsecured by any lien constituted the first step, and that it was consummated by the transaction at the bank on the morning of September 5, 1912. * *

I believe Barsaloux told the truth when he said Major was 'beat out of that mortgage.' * * I cannot believe Aranoff's statement that the arrangement was made in reference to the payment of \$3,000, and placing a credit of \$1,000 on each of the three notes remaining unpaid, upon the ground that 'Major wanted to have his notes better secured for the balance of \$500 on each note.' It is undisputed that the notes were not secured at that time in any way whatever, so that Major would be in no better position by crediting these amounts on the different notes than he would be in payments were made in full upon each note. * * Complainant avers that the money was paid to Major at the bank, and that the notes were not there, so that no endorsement was made or could have been made upon them at the time. Both Barsaloux and Major say that the notes were taken to the bank and produced, and I believe their evidence is true upon that point. Aranoff does not claim ever to have requested that these endorsements be made upon the notes, nor did he attempt to see or communicate with Major from September 5th until about the middle of December, and it does not appear then that this matter was the subject of discussion. This conduct is clearly incompatible with the care taken as to the rest of the detail in connection with the matter. Moreover, it is obvious that Major could have transferred these notes any time before their maturity, and in that way any claim of payment on Aranoff's part would have been overcome, provided Major wanted to cheat Aranoff out of his money. In my judgment the fact that Major never disposed of any of these notes, or attempted to do so, indicates very clearly that his connection with the matter was honest and straightforward in all respects. It is evidence which militates very strongly in his favor.

I do not doubt the honesty and integrity of the greater number of complainant's witnesses outside of the two Aranoffs. * * Unquestionably the paying teller, Commons, and the assistant paying teller, Stark, are honest, straightforward men. Stark does not claim ever to have seen Major before, and Commons does not pretend that he saw the money paid to him. Here a check is produced, paid through the department of the bank in charge of these two witnesses. The psychological effect of this would be to cause both of these individuals to assume that it was done regularly and in due course. It should be noted that Meyer Aranoff, who testified in detail as to all the transactions which took place at the bank, says nothing whatever about any conversa-

tion occurring between the paying tellers and himself and Major. With only a slight confusion in regard to the matter such a conversation might have taken place and a mistake be made as to the identity of the persons present, or to whom the money was paid. * * In view of the testimony of both Bersaloux and Major, the evidence as to all the attending circumstances and the weight to be given to the facts which I have indicated, I can only conclude that Commons and Stark are confused or mistaken in regard to the matter. * *

I am convinced that Major was paid only \$505 at the bank, as he testified, on the morning of September 5, 1912. I also believe that the check for \$3,505, dated September 5, 1912, Complainant's Exhibit 4, was not endorsed by him at that time, but at some time prior thereto."

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Among the formal findings of fact, made by the master and approved by the court in its decree, there are four in substance as follows: (1) That the signature "Adolph Major" on the back of the check of M. K. Aronoff for \$3,505, dated September 5, 1912, payable to the order of Adolph Major, is the genuine signature of Adolph Major. (2) That said signature on the back of said check was not made by Adolph Major or placed upon said check on the morning of September 5, 1912, but was placed thereon prior to that time. (3) That Adolph Major, on the morning of September 5, 1912, at the Colonial Bank, Chicago, was paid the sum of \$505 by Meyer Aronoff, brother of complainant, and that no other sum was paid him at that time. (4) That a payment of \$3,000 was not made by complainant to the defendant, Major, on said date at said bank, and that amounts of \$1,000 each should not be credited on the three notes, dated December 10, 1910, due respectively on or before January 2, 1913, 1914, and 1915, and now owned and possessed by said defendant.

It is contended by counsel for complainant that there is no evidence in the record to support the finding of the master, approved by the court, viz, that the defendant's endorsement was not placed on the check in question on the morning of September 5, 1912,

but "prior to that time," and that the finding of the master, approved by the court, viz, that \$3,000 was not paid by complainant to defendant on said morning and that \$1,000 should not be credited on each of the three notes in question is against the manifest weight of the evidence. After a careful examination of the evidence in this case, and in view of the conclusions of the master who saw the various witnesses, we are unable to agree with counsel. We think that the evidence sufficiently disclosed that said check was not endorsed by defendant on the morning of September 5, 1912, and that he was not paid at said time the sum of \$3,505, as claimed, but only the sum of \$505. In our opinion the chancellor was fully warranted in dismissing complainant's bill for want of equity at his costs. And we do not think that the amount allowed by the court for master's fee is excessive, as claimed.

The decree of the Superior Court is affirmed.

AFFIRMED.

542 - 20875

NATHAN K. ARANOFF,
Appellant,

vs.

ADOLPH MAJOR,
Appellee.

ORIGINAL FROM

SUPERIOR COURT,

COOK COUNTY.

194 I.A. 618

STATEMENT OF THE CASE. On January 9, 1913, the complainant, Nathan K. Aranoff, filed a bill in the Superior Court of Cook County to enjoin the defendant, Adolph Major, from negotiating or transferring three promissory notes for \$1,000 each, and to compel the defendant to endorse upon each of the said notes a payment of \$1,000. A preliminary injunction without notice was issued. Subsequently, the amended answer of the defendant was filed and the cause was referred to a master in chancery, Frank Hamlin, Esq., to report the evidence and his conclusions to the court. A hearing was had and on December 23, 1913, the master filed his report recommending that the bill be dismissed for want of equity. Objections filed before the master were ordered to stand as exceptions, and on March 10, 1914, the court entered a decree, overruling the exceptions, confirming the master's report and dismissing the bill for want of equity at complainant's costs, from which decree this appeal has been perfected.

The averred basis of the bill was that \$1,000 had been paid by Aranoff to Major on each of said three notes, in accordance with a previous understanding and agreement, but that Major had refused to give credit to Aranoff for the payment, had failed to endorse the payments on said notes and was seeking to collect the full amount thereof.

The sole question involved in the case is one of fact, viz: Was Major paid the sum of \$3,505 at the Colonial Trust &

savings bank (hereinafter referred to as Colonial Bank) on September 5, 1912? Major admits the receipt of \$505 at that time, but denies that any further payment was made to him.

It appears from the evidence that Aronoff bought from Major certain property on Kimbark avenue in the city of Chicago for which he gave certain promissory notes secured by first mortgage on the property. One or more of these notes were afterwards paid, and on December 10, 1910, the unpaid notes, aggregating the sum of \$6,000 were canceled and the ones in controversy, Nos. 2, 3, 4 and 5, for \$1,500 each, maturing on January 2, 1912, 1913, 1914 and 1915, respectively, all bearing interest payable semi-annually at the rate of $5\frac{1}{2}$ per cent per annum, and payable to the order of Major, were executed by Aronoff and delivered to Major. Note No. 1 was apparently paid; at any rate it is not now involved. The notes recite upon their face that they are secured by a "junior mortgage" on lots 3 and 4, block 1, in Hall's Addition to Hyde Park, but it is not claimed that they were actually so secured. The testimony is conflicting as to how that situation was brought about. Aronoff testifies that this statement was placed upon the notes because Major wanted it, and that the mortgage was released because Major got \$200 therefor. James E. Barsaloux, the person mentioned as trustee in the notes, and Major both deny this, claiming that the trust deed was released at Aronoff's request long enough for him to put a first mortgage on the property, and that he returned the notes purporting to be secured when in fact they were not. Barsaloux testified that Major was "beat out of that mortgage." Note No. 2, for \$1,500, due originally January 2, 1912, was not paid when it became due, and on January 3, 1912, Aronoff gave Major a check drawn on said Colonial Bank for \$202.50. This payment was for \$165, interest for six months on the principal sum of \$6,000 at the rate of $5\frac{1}{2}$ per cent per annum, and \$37.50, as

a consideration for extending said note to July 2, 1912. On this latter date Aranoff requested Major to go with him to said bank, and Major did so, and Aranoff there gave Major two checks, both dated July 1, 1912, one check for \$165 for interest due on said principal sum of \$6,000 as evidenced by all four notes, and the other check for \$1,000 in part payment of the amount due on said note No. 2. This left the sum of \$500 unpaid on said note No. 2. Aranoff testified that said note was not paid in full because "I had other transactions at the time and perhaps I had to use the money for some other purpose." Aranoff further testified that it was the practice, whenever any payment was due, for Major and himself to go to the Colonial Bank together, that he would make out a check, that Major would then endorse it, that Aranoff would then C. K. it, and that Major would then go to the paying teller's window and get the cash. Major, on the contrary, testified that in each instance when payments were made to him by check at the bank he endorsed the check, returned it to Aranoff, who would get the money from the teller and give it to him, and that he never got any money from the paying teller direct. At this time, July 2, 1912, Major received the amount of said checks in cash. Subsequently several conversations were had between Aranoff and Major as to the payment of the balance of \$500 unpaid on said note No. 2, and as to the payment of the other three notes. Finally, about September 3, 1912, it was agreed that the balance due on note No. 2 should be paid and a further payment of \$3,000 made by Aranoff, \$1,000 to be credited on each of the other three notes, leaving a balance of \$500 unpaid on each. As a consideration for the payment of this \$3,000 on notes not yet due, Major agreed to allow all interest on this \$3,000 from July 2, 1912, the time when the last interest payment was made.

Aranoff's claim of payment of the unpaid balance of

\$500, and interest, on said note No. 2, and of \$1,000 on each of said other three notes is predicated upon a certain check (complainant's exhibit 4) for \$3,505, dated September 8, 1912, signed by Aronoff, payable to the order of "Adolph Major" and drawn on said Colonial Bank. The check was introduced in evidence. It has stamped in the upper left hand corner the words: "Your endorsement will be considered a receipt in full for account as stated below." On the face of the check also appear the following words in writing in the lower left hand corner: "Five hundred and five dollars (\$505) in full payment of note #2, and interest to date on four notes, and three thousand dollars (\$3000) to be applied as follows: one thousand dollars (\$1000) on each note, #3, #4, #5, leaving balance of five hundred dollars (\$500) on each note, or total due on the three notes \$1500." The check is not numbered. On the back appears the endorsement "Adolph Major," and underneath "O.K., M. Aronoff." Early in the hearing before the master Major testified that the signature "Adolph Major" on the back of the check "looks like mine, but it is not," but as the hearing progressed, as stated by the master in his report, "it was tacitly if not actually admitted that this was Major's signature, and such is undoubtedly the fact." Major further testified that on July 2, 1912, when he received at the Colonial Bank from Aronoff said checks of \$165 and \$1,000, Aronoff requested him to sign his name on the back of three pieces of paper, which he did although he did not see the face of the papers, and that Aronoff took the papers from him and soon brought back the money, \$1,165, and gave it to him. These two checks, with Major's endorsement thereon, were introduced in evidence, but what became of the third piece of paper then endorsed by Major, as he says, does not appear. It was urged before the master and is here contended that in this manner Major's signature was obtained on the back of said check for \$3,505.

The defendant, Adolph Majer, further testified as follows:

1098:

"I live at 5345 Washington Avenue, Chicago. I will be 75 years old next March. * * The way I came to go to the Colonial Bank on September 5, 1912, was that Mrs. Aranoff, wife of complainant, came to me the day before and told me to be there sharp * * at 11 o'clock. She said Mr. Aranoff started in the morning early about five o'clock, suddenly, and he could not meet me at the bank, but his brother (Meyer Aranoff) would be there, and that his brother didn't know me, but her sister would be there to identify me. On September 5th I went to Mr. Barsaloux' office, and we came down together to the bank, expecting to get \$3,500. I brought all my notes with me to the bank, and I handed them to Barsaloux. Aranoff's brother was there, a young man, and he took out of a big, white envelope four bills of \$100 each and two \$50 bills and one \$5 bill, and handed them to me, and I said 'Is that all you are going to pay?' and he said 'That is all my brother gave me.' * * After he gave me \$305, Mr. Barsaloux brought me to the Bank of Montreal, and left me there, and I took my bank book and money and * * deposited it. * * Mr. Barsaloux had the four notes and when Mr. Aranoff handed him the \$305 he took the note and marked 'paid' on it * * He handed me back the other notes, and I brought them home * * He left 63rd street at 10:20, I think. It must have been about a quarter or ten minutes to eleven o'clock when I got to the Colonial Bank. We were at the bank about five minutes. Meyer Aranoff was at the bank when we got there. Miss Arkin was there when we came in. * * She introduced us, and was there at the time the money was paid. After the money was paid we all went out together. After I left the Bank of Montreal I * * went straight home and did not go back to the Colonial Bank. * * Mr. Barsaloux was standing alongside of me during the entire time I was in the bank on September 5th. * * H. K. Aranoff never paid me anything, and nobody for him ever paid me anything, on the principal of the last three notes. * * I am the owner and holder of these notes. They have been in my possession continuously since the date they were delivered to me originally by Mr. Aranoff. When they became due, to get them paid, I put them in the bank. I gave instructions to the Woodlawn Trust & Savings Bank to collect \$1,500 on note No. 3, and the interest on the three notes."

James B. Barsaloux further testified as follows:

"I am in the real estate business at 63rd and Washington Avenue. I know both the complainant and defendant. I have known H. K. Aranoff about 19 years. I have always handled his business. I have known Majer about 12 years. * * I have done business for him, too. * * Majer came to my office about 1 o'clock in the afternoon. It was the day before we went to the bank. * * Majer told me what was to be done. He said the understanding was that \$1,000 was to be paid on each of these notes * * That was the reason I went with him, to see that he got \$3,500. * * On September 5th we took the 10:20 train from 63rd street. * * and I knew we got into the bank not later than 10 minutes to 11 o'clock. * * Mr. Aranoff's sister-in-law came in and she introduced us to a brother of Mr. Aranoff. * * We stepped over to the place where you make out your deposits, and he produced a large, white envelope, and pulled out four \$100 bills, two \$50 bills and a \$5 bill,

THE HISTORY OF THE UNITED STATES OF AMERICA

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and * * laid them down in front of Major * * . I counted them, and I said, 'Is this all the money you have got,' and he replied 'That is all the money I know anything about.' I said 'we were to get \$3,500 here,' and he replied, 'I don't know anything about that.' I then took this note and marked across it 'Paid 9/5/1912' * * and I had Major sign it. I refer to the note for \$1,500, * * * due on or before January 2, 1913. After we got the money Major put the other notes back in his pocket, and I took him to the Bank of Montreal and left him at the door of the bank * * I never saw the check for \$3,505 (being complainant's exhibit 4) in the Colonial Bank on September 5th. I went into the Colonial Bank with Major on that date and stayed there as long as he did. * * During the time we were there Major did not sign his name on the back of said check. The assistant paying teller did not pay any money to Major while I and he were in the bank. He did not pay any money to Meyer Aranoff while I was there. * * Miss Arkin, Meyer Aranoff, Major and I, all four left the bank together. * * I went into the bank alone with Major, and from the time I went in until the time I came out he never left me for a moment * * Major did not go to the cashier's window at all, and * * Meyer Aranoff did not while I was there. * * We were not in the bank 5 minutes after these people came in."

The complainant, N. K. Aranoff, further testified in substance that he is in business in Chicago as a bookbinder; that he left the check for \$3,505 enclosed in an envelope with A. N. Arkin, an attorney with offices in the Ashland Block, on the morning of September 5th, telling Arkin of his appointment to meet Major at the Colonial Bank at twelve o'clock, and requesting him to meet Meyer Aranoff at the railroad station and give the latter said envelope and contents; that he went himself to Valpariso, Indiana, on the 11:05 A. M. train that morning, returning the next day; that the only time, after September 5, 1912, and prior to the commencement of this litigation, that he saw Major was "towards the middle of December" when he called at Major's house and offered to sell him some notes," and that he received a notice from the Woodlawn Bank to the effect that the bank had a note of his for collection about January 1, 1913, but that he did not go to the bank.

A. N. Arkin testified in substance that complainant left the check for \$3,505 in an envelope with him on the morning of September 5th; that he went to the La Salle street station about 11 o'clock, waited about 15 minutes, met Meyer Aranoff as he came in on the train, and gave him the envelope containing the check, and

that he then telephoned Miss Arkin to go to the Colonial Bank and introduce Meyer Aranoff to Major.

Mrs. Oscar Blumenthal (Miss Arkin), wife of one of the solicitors for the complainant, testified in substance that about 11:30 o'clock on the morning of September 5th she was in her husband's office when she was called on the telephone by A. S. Arkin; that after receiving the message she left the building about twelve o'clock and went to the Colonial Bank and there met Meyer Aranoff; that Meyer Aranoff was married to her cousin and that complainant was her brother-in-law; that she saw Major and Barsaloux come into the bank; that she told Major that complainant was away but that Meyer Aranoff was there to handle the matter, and that she introduced him to Major.

Meyer Aranoff testified in substance that he lived at Indiana Harbor where he was employed in the furniture and merchandise business; that he had been doing business with said Colonial Bank for 3 or 4 years; that about nine o'clock on the morning of September 5th he received a long distance telephone call from complainant; that complainant told him there was a man named Major to whom complainant had promised to give a check for \$3,505 that morning, and that complainant wanted him to come to Chicago and take care of the matter for complainant as he (complainant) was obliged to go out of town; that he accordingly took a train for Chicago about 10:30 o'clock; that he was met at the Chicago depot by A. S. Arkin, who gave him an envelope marked "Mr. Aranoff"; that he went to the Colonial Bank about 11:50 A. M.; that shortly thereafter Miss Arkin came in and introduced him to Major; and that "I said to him, 'Here is a check for \$3,505,' and he says, 'Can I get the cash?' and I said 'Yes.' * * I gave it to Major and he endorsed it and handed it over to the cashier. I saw Major sign the signature on the back of the check, 'Adolph Major.' The words 'O.K., M. Aranoff' is my signature. I put that on there after Major placed his endorsement

on it. Major handed the check over to the cashier of the Colonial Bank, and the cashier paid Major \$3,505. I saw him pay that. There were three bills of \$1,000 each, five bills for \$100 each and one \$5 bill. I saw Major take the three bills of \$1,000 each and put them in his pants pocket; the rest he kept in his hand. Then he went up to a post and there was another gentleman with him in the bank. * * At that time he endorsed the note and gave it to me."

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In coming to a conclusion on this question I am influenced to the greatest extent by the appearance of the witnesses, their demeanor while testifying, their general manner of conducting themselves, as well as by the many personal elements which give weight to the evidence and make convincing the impression as to its truth or falsity.

1. *Journal of the American Medical Association*, 1997; 277: 1033-1038.

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It is my judgment that there was a plan evolved to defraud Major out of his money, of which procuring him to obtain the release of a trust deed by Barsaloux on Kimbark avenue, and the return to him of the notes unsecured by any lien constituted the first step, and that it was consummated by the transaction at the bank on the morning of September 5, 1912. * *

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I am convinced that Major was paid only \$500 at the bank, as he testified, on the morning of September 5, 1912. I also believe that the check for \$3,500, dated September 5, 1912, Complainant's Exhibit 4, was not endorsed by him at that time, but at some time prior thereto."

MR. PRESIDING JUSTICE CHINLEY DELIVERED THE OPINION OF THE COURT.

Among the formal findings of fact, made by the master and approved by the court in its decree, there are four in substance as follows: (1) That the signature "Adolph Major" on the back of the check of M. K. Aranoff for \$3,500, dated September 5, 1912, payable to the order of Adolph Major, is the genuine signature of Adolph Major. (2) That said signature on the back of said check was not made by Adolph Major or placed upon said check on the morning of September 5, 1912, but was placed thereon prior to that time. (3) That Adolph Major, on the morning of September 5, 1912, at the Colonial Bank, Chicago, was paid the sum of \$500 by Meyer Aranoff, brother of complainant, and that no other sum was paid him at that time. (4) That a payment of \$3,000 was not made by complainant to the defendant, Major, on said date at said bank, and that amounts of \$1,000 each should not be credited on the three notes, dated December 10, 1910, due respectively on or before January 2, 1913, 1914, and 1915, and now owned and possessed by said defendant.

It is contended by counsel for complainant that there is no evidence in the record to support the finding of the master, approved by the court, viz, that the defendant's endorsement was not placed on the check in question on the morning of September 5, 1912,

but "prior to that time," and that the finding of the master, approved by the court, viz, that \$3,000 was not paid by complainant to defendant on said morning and that \$1,000 should not be credited on each of the three notes in question is against the manifest weight of the evidence. After a careful examination of the evidence in this case, and in view of the conclusions of the master who saw the various witnesses, we are unable to agree with counsel. We think that the evidence sufficiently discloses that said check was not endorsed by defendant on the morning of September 8, 1912, and that he was not paid at said time the sum of \$3,800, as claimed, but only the sum of \$303. In our opinion the chancellor was fully warranted in dismissing complainant's bill for want of equity at his costs. And we do not think that the amount allowed by the court for master's fee is excessive, as claimed.

The decree of the Superior Court is affirmed.

AFFIRMED.

MAREMONT, WOLFSON & COHEN CO.,
a corporation,

Appellee,

vs.

SCHWARZSCHILD & SULZBERGER CO.,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

194 I.A. 619

STATEMENT OF THE CASE. On May 3, 1911, plaintiff (appellee) commenced in the Municipal Court of Chicago an action of the first class in assumpsit, based upon a written contract, against defendant (appellant), claiming damages in the sum of \$2,447.10. Plaintiff demanded a jury. The case was tried before a jury and on June 15, 1911, they returned a verdict finding the issues against the defendant and assessing plaintiff's damages at the sum of \$2,431.10. Motions for a new trial and in arrest of judgment were overruled, and judgment upon the verdict was entered and this appeal was perfected.

Plaintiff's second amended statement of claim is in part as follows:

"Plaintiff is in the business of manufacturing and repairing wagons. Defendant is engaged in the business of beef and pork packing. For about 5 months prior to November 23, 1908, plaintiff performed work of repairing on defendant's wagons. On November 23, 1908, plaintiff submitted to defendant a proposal, a copy of which is as follows:

We propose to furnish all materials and labor to repair, paint and fully maintain all your rolling stock equipment, listed below, connected with your stables at Chicago, as follows: We will take your equipment in its present condition and keep it in repair; you agree to let us do all your overhauling and repainting of the wagons, bugies and carts now in your stables, as listed below; you to have the liberty to

NOTICE

NOTICE OF THE BOARD OF DIRECTORS OF THE
[Illegible text follows, appearing to be a notice of a meeting or action by a board of directors. The text is mirrored and largely illegible due to the quality of the scan.]

THE BOARD OF DIRECTORS OF THE [Illegible]
[Illegible text continues with details of the meeting, including dates and times.]

IT IS HEREBY ORDERED THAT THE [Illegible]
[Illegible text continues with the resolution or decision of the board.]

WITNESSED MY HAND AND SEAL OF OFFICE THIS [Illegible] DAY OF [Illegible] 19[Illegible]

[Illegible Signature]

[Illegible Title]

add or diminish the number of each class of vehicles according to the needs of your business:

15 single wagons, 16 double wagons, 2 four horse wagons, 7 dump carts and cripple carts, 11 buggies, 1 mail cart, and 12 shop fat wagons.

We will overhaul and repaint any single wagon at \$56.25, double wagon at \$70.20, four horse wagon at \$70.50, buggies at \$33.75, dump carts and cripple carts at \$22.50, mail cart \$25, and shop fat wagons \$70; all overhauling and general repairing and painting to be done at our factory, we to call for and deliver the work. In overhauling we agree to take all springs apart and clean and oil them before painting. * * Our price for overhauling your buggies does not include the maintenance and replacement of your rubber tires.

For and in consideration of your agreeing to give us all your business on the overhauling and repainting of your wagons, we agree to keep all your rolling stock in repair throughout the year without charge. We agree to pay you for all petty repairs which you may find advisable to have done at your own shops by your own men, such as repairing or tightening clips, putting in or tightening bolts, etc. * * We agree to do all the work in an expeditious manner and at such time as will least interfere with your business. You are to pay us on the 10th day of each month for all the overhauling and repainting done by us during the preceding month, terms net cash. It being understood that we will make bills for each job as overhauled at the foregoing prices, and that the light running repairs done on your vehicles are not to be billed, the cost thereof being contemplated in the above itemized prices.

This contract to run for two years from date, and to continue after that time until cancelled by either party giving thirty days' notice to the other party, and shall cease upon the termination of such thirty days' notice, excepting on the equipment that has been overhauled and repainted less than a year previous to date of cancellation. On this equipment the contract is to run until one year from date of overhauling.

Your acceptance of this proposition will constitute a contract, which we agree to live up to to your entire satisfaction, and in case this work is not done to your satisfaction we grant you the right of cancelling this contract when you see fit.

MAREMONT, WOLFSON & COHEN CO.
per L. S. Maremont.

Accepted
SCHWARZSCHILD & SULZBERGER CO.
per C. B. Kitzinger.
Jany. 23, 09.

"That after such proposal was submitted defendant sent its wagons to plaintiff and plaintiff repaired them; that on January 26, 1909, defendant accepted such proposal; and that on February 5, 1909, defendant submitted in writing an addition to said contract, as follows:

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Please add to your contract 3 single wagons that we have at the North Side Oakdale Branch, Nos. 10, 16 and 5, and arrange to repair and repaint these wagons promptly, according to the terms of our contract, at \$56.25 each, keeping them in repair gratis for one year. Same terms to apply on these wagons as on the plant wagons that you have under contract.

We have had quite a few complaints about some of the work that you have turned out to date, and we want to impress upon you that unless this work is turned out in the future in an entirely satisfactory manner we will be compelled to take this work away from you. * * When you did our first work for us we found no room for complaint and we hope that the future work will be done equally as well.

"That said addition plaintiff accepted and said original contract was amended to such extent; that subsequent to February 5, 1909, plaintiff and defendant corresponded and had interviews relating to the terms, construction and meaning of said contract; that it was thereupon understood and agreed that under the terms of such original contract every wagon included therein should be turned in to plaintiff for overhauling and repainting upon the expiration of one year from the time said wagon was last overhauled and painted; that it was further agreed that the fat wagon mentioned in said contract should be entirely eliminated therefrom; that the afore-said arrangement was to cover all of the rolling stock used by the defendant each year, and that work was commenced on December 14, 1908, and continued for a period of two years, or to December 14, 1910.

"That during the first year of the agreement the defendant operated 20 single wagons, 16 double wagons, together with a number of buggies and carts; that defendant delivered to plaintiff 15 single wagons and 8 double wagons to be repaired and repainted, which work plaintiff performed, but that on 5 single wagons and 8 double wagons, which under said agreement should have been turned in during the first year for repairing and repainting, the defendant delivered such wagons for repairing and refused to deliver such wagons to plaintiff for repainting, and that by reason of such refusal plaintiff, having kept such wagons in repair during the first

contract year, was unable to paint such wagons, and thereby defendant refused to pay plaintiff the cost of repairing said 5 single and 8 double wagons.

"That during the second year of such contract, the rolling stock equipment of defendant consisted of 20 single wagons, 16 double wagons, 11 buggies, 7 carts and 1 mail cart; that defendant delivered to plaintiff for repairing and repainting 16 single wagons, 9 double wagons, 8 buggies and 1 carts, which work was performed upon such vehicles; that defendant delivered and plaintiff kept in repair for a period of one year thereafter 5 single wagons, 7 double wagons, 3 buggies, 5 carts and 1 mail cart, but that defendant refused to permit said last mentioned vehicles to be repainted; that thereby defendant obtained from plaintiff the repairing during said second year upon such vehicles, and the repairs for said year, but that by reason of said refusal to permit the painting of such vehicles defendant refused to pay plaintiff the value of the work of such repairing or the amounts stipulated in said agreement.

"That plaintiff is entitled to the stipulated price for the first year, December 14, 1908, to December 14, 1909, as follows:

5 single wagons at \$56.25 each	\$281.25	
8 double wagons at \$70.20 each	<u>561.60</u>	\$ 842.85

From December 14, 1909, to December 14, 1910,		
5 single wagons at \$56.25 each	281.25	
7 double wagons at \$70.20 each	491.40	
3 buggies at \$45 each	135.00	
5 carts at \$22.50 each	112.50	
1 mail cart	<u>35.00</u>	1045.15
		1888.00

From which sum defendant is entitled to a rebate for the reasonable value of the painting not placed upon the wagons, which is		150.00
		<u>\$1738.00</u>

That plaintiff is also entitled to a balance due on account for repairing and repainting, and under an account stated, which defendant agreed to pay plaintiff, of		449.10
and interest at 5% from December 14, 1910, to date		<u>260.00</u>
or the total sum due plaintiff from defendant of		\$2447.10"

To this statement of claim the defendant, by its attorney, filed an affidavit of defense. Defendant did not deny the

execution of the contract of January 23, 1909, or of the amendment made thereto on February 5, 1909, and defendant did not deny that subsequent to the execution of said contract it was finally agreed between the parties that the fat wagons mentioned in the contract should be eliminated therefrom. But defendant denied that from December 14, 1908, and until December 14, 1910, it delivered any vehicles to plaintiff for overhauling and repainting which it did not permit plaintiff to repaint, and further denied that it owed plaintiff any balance upon an account stated, as claimed, or that it owed plaintiff any other sums of money whatsoever.

Prior to the trial the defendant filed 18 interrogatories, under section 32 of the Municipal Court Act, to be answered by plaintiff, as to the times and places certain interviews were had between plaintiff's secretary and treasurer, Leo S. Waremont, and the purchasing agent of defendant, W. B. Kitzinger, and between said Waremont and one Maurice Silverman, a clerk under said Kitzinger, and as to what was said at all of said interviews. The court ruled that plaintiff answer as to the times and places such interviews were had, but need not answer as to what said said, and plaintiff subsequently filed answers in compliance with the court's ruling.

On the trial plaintiff's only witness was said Leo S. Waremont, who testified at considerable length. In connection with his testimony various letters written by defendant to plaintiff, and copies of plaintiff's letters and statements to defendant, which the witness stated were correct copies, the originals of which he personally dictated, signed, and mailed in the regular course of business, addressed to said Kitzinger, as purchasing agent of defendant, were offered and received in evidence over the general objection of defendant's attorney, and the further objection that no proper foundation had been laid for the intro-

duction of copies. It appeared that notice had been duly served on defendant to produce the originals of plaintiff's letters and statements, [but that said attorney took the position that because said letters appeared to have been sent to said Kitzinger (though as purchasing agent of defendant) they were letters addressed to a third party and Kitzinger should have been served with a subpoena duces tecum to produce said original letters, or show why he could not produce them, before the copies could be introduced. The court ruled, in substance, that as they appeared to be letters addressed to said Kitzinger in his official capacity as purchasing agent of defendant, they were in effect letters addressed to defendant, and should be properly in defendant's possession, and that, if defendant did not see fit to produce the originals upon due notice served, the said copies might be introduced.]

For some considerable period of time prior to the making of plaintiff's proposition to defendant the former had performed work in overhauling and repairing certain of defendant's vehicles. Defendant had had a previous arrangement with another wagon repairer, Voltz Brothers, which had been canceled, and under which the overhauling and repainting of a vehicle had been done for a stipulated annual sum, which sum also covered the cost of minor repairs and maintenance for a period of 12 months after each annual overhauling and repainting, and under which arrangement each overhauled vehicle, at the end of 12 months, was to be again overhauled and repainted. It appears from the terms of the contract in question that a somewhat similar arrangement was contemplated between the parties. Although plaintiff's written proposition was not formally accepted in writing until January 23, 1909, it also appears that defendant prior to said date, and from time to time commencing December 14, 1908, wrote plaintiff seven letters, in each of which defendant directed

plaintiff to "repair and repaint" certain specified vehicles, "as per our contract." Mr. Maremont testified to a number of conversations had with Mr. Kitzinger after said contract was executed, one of them being had in February, 1909, relative to a wagon which had been sent to plaintiff's shop for overhauling and which had been out of Voltz Brothers' shop for less than one year. As a result of the conversation plaintiff overhauled and repainted said wagon. On April 2, 1909, plaintiff wrote Kitzinger, purchasing agent of defendant, that it had received a verbal order from a representative of defendant to repair a buggy and that it had repaired and repainted it, and defendant replied, "Please have it understood in the future that no work is to be done on any of our equipment unless you have a written order from our purchasing department." On June 5, 1909, plaintiff wrote Kitzinger that a certain shop fat wagon had been overhauled and painted by plaintiff on June 5, 1908, and that the wagon was then guaranteed for one year, and requested that said wagon be sent in for a general overhauling. On June 12, 1909, plaintiff wrote Kitzinger that another shop fat wagon had been overhauled and painted on June 19, 1908, and requested that the wagon be "sent in for overhauling at the expiration of one year, as arranged." On June 15, 1909, defendant answered said letters, saying: "Would be glad to have you look over" said wagons; "let us have a proposition from you on these." On June 16, 1909, plaintiff replied to Kitzinger that said wagons "are included in the contract consummated January 23rd. These wagons are to be taken care of at \$70. You will recollect that the matter of prices on these wagons was gone into thoroughly by you at that time." On July 19, 1909, plaintiff wrote Kitzinger that 5 shop fat wagons (giving the numbers of the wagons) "have been overhauled more than one year ago." To these last two letters plaintiff received no reply, and early in August, 1909, Maremont called on Kitzinger and said to him, in substance, that plaintiff had

received no answer to said letters, that he (Maremont) had called for the purpose of coming to an understanding as to the rights of both parties under said contract of January 23, 1909, that under it, according to his (Maremont's) construction, shop fat wagons and all other wagons are to again come into plaintiff's shop to be repaired and repainted one year from the date on which they were painted, that "I have notified you from time to time whenever any wagons have to be in the shop again for repainting, and you have always sent the wagon to be repaired, but you don't let me paint it, and I cannot get my money," and that "as I understand the contract, every wagon has to be painted once a year, * * that you pay us (plaintiff) so much per year for repairing, maintaining and painting one of your wagons, and that the time of painting is the time when I get the yearly contract price"; and Kitzinger replied that that also was defendant's understanding. On August 28, 1909, plaintiff wrote Kitzinger again calling attention to the fact that certain wagons were being repaired from time to time but were not left with plaintiff for the "regular yearly overhauling." On September 8, 1909, plaintiff wrote Kitzinger to the same effect and saying: "You fully understand that we cannot maintain your wagons at the yearly contract price and be paid only every other year or so." On October 2, 1909, plaintiff wrote Kitzinger that "we see no reason why we should, at one year's price, maintain your wagons for 15, 18 or more months. In fact, there is no reason why we are to maintain your wagons for one week more than one year, and under the conditions we are compelled to call this part of the contract off. Shop fat wagon, No. 54, is here for overhauling as per your order No. 8819. This wagon will not be repaired and will be returned to you as soon as we are notified to do so." To this letter defendant replied on October 5, 1909, saying, "We do not quite understand * * why you selected the shop fat wagons and want to cancel this end of the contract. If you want to cancel * * you will have to cancel the entire con-

ract. * * Please explain why you are not repairing shop fat wagon, No. 54, as you have the order to do this work as per the contract. We are doing what we can to get these wagons into you within a year's time to be repaired, and hope that in the future we will have no further trouble." In November, 1909, Maremont again called on Kitzinger and again explained the situation and suggested canceling the entire contract, or, if Kitzinger preferred, only that part of the contract which related to the shop fat wagons; Kitzinger replied that "he was satisfied to let out the shop fat wagons"; and Maremont told him plaintiff would go ahead with the contract eliminating the shop fat wagons; and after this plaintiff did no work on the shop fat wagons. Maremont further testified that defendant's wagons were not generally used on Saturday afternoons, that on those afternoons he was accustomed to go to defendant's stables and look over all the wagons and ascertain what wagons were due for repainting, that such wagons as were due he would get them in to plaintiff's shop and have them overhauled and then ask for orders for repainting, that those upon which orders for repainting were received were repainted, and those upon which such orders were not received he returned to defendant "on the promise that they would come back very shortly for painting."

During the first year from December 14, 1908, to December 14, 1909, defendant operated 20 single wagons and 15 double wagons. Of the single wagons 15 were repaired and repainted by plaintiff, but 5 were not repainted, although they were overhauled. Of the double wagons 8 were repaired and repainted, but 7 were not repainted although overhauled. Plaintiff received no pay for repairing said wagons which were not repainted.

During the early part of January, 1910, Maremont again called on Kitzinger and told him of the number of single and double wagons upon which plaintiff had made repairs from time to time during said year but which plaintiff had not been allowed to overhaul and

repaint, and that as a result plaintiff had been unable to charge defendant for the work done or get its money therefor under the contract. Fitzinger replied that he would investigate the matter and requested that, in the meantime, plaintiff send him a list of said wagons. On January 14, 1910, plaintiff mailed Fitzinger a statement, giving the numbers of said wagons, and on February 4, 1910, another statement giving the dates when said wagons had last been overhauled and painted. On February 7, 1910, defendant wrote plaintiff: "Referring to yours of the 4th, we understand you now have in your shop three of our wagons. * * As soon as these are returned we will put through another lot. We are anxious to have our wagons go through your shop once a year, and would like to have you do what you can to rush them out."

During the latter part of February, 1911, Moremont called at the office of the purchasing department and told Maurice Silverman that he wanted "an understanding with reference to the actual balance due, not figuring those wagons on which they had violated the contract," and gave Silverman an itemized statement or invoice, and Silverman took the statement to the auditing department to have it verified, and soon returned and said that the auditing department had said that the statement was correct. A copy of said statement was introduced in evidence after notice served on defendant to produce the original. The statement showed on its face the total sum of \$849.10 due plaintiff, made up of various items from January 12, 1910, to November 19, 1910. On February 27, 1911, the defendant sent plaintiff a check for \$400, which plaintiff cashed. Accompanying the check was a written memorandum addressed to plaintiff. On its face in printing were the words, "We enclose herewith check in full settlement of your invoice"; immediately below in typewriting were the words, "cash advanced to apply on account, \$400." The balance of said statement, \$449.10, was never paid plaintiff.

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During the second year from December 14, 1909, to December 14, 1910, defendant operated 20 single and 15 double wagons, 12 buggies, 7 carts and 1 mail cart. Of these 13 single wagons, 9 double wagons, 9 buggies and 8 carts were repaired and repainted and the work paid for by defendant, and 7 single wagons, 6 double wagons, 3 buggies, 5 carts and 1 mail cart were repaired, but not repainted. Plaintiff received no pay for the vehicles repaired but not repainted.

Maremont further testified that plaintiff never rendered a bill or statement to defendant for the work done on the vehicles which were repaired but not repainted during said first and second years, but that he, in plaintiff's behalf, made several demands for payment for said work; that on one occasion he demanded payment of Kitzinger, that the latter turned him over to Silverman, but that he (Maremont) was unable to adjust the matter with Silverman, and finally ceased negotiations "and fixed up all possible wagons to prepare myself for a lawsuit"; that in December, 1910, Silverman asked him what he proposed to do about repairing the wagons which had been out of the shop less than one year, and that he told Silverman that plaintiff would keep these in repair; that subsequently certain wagons were sent in for repairs and plaintiff repaired them; and that plaintiff stopped doing any work for defendant in the early part of January, 1911.

Maremont further testified that he had personal charge of every wagon of defendant which came into plaintiff's shop, that he had been in the wagon business for 16 years, that he was familiar with the fair, reasonable market value of the painting required to be done on those wagons sent into plaintiff's shop, which were repaired but not painted, during said two years, and that such fair and reasonable value was \$250.

Besides the deposition of Maurice Silverman, portions of which were read to the jury, the only witnesses offered by defendant, as appears from the abstract, were John Suter, a

clerk of defendant and who kept a record of defendant's stable equipment, and Edward C. Voltz, a wagon maker and repairer. Voltz was asked questions as to the market price for painting some of defendant's wagons and he replied to those questions, but when it appeared on cross-examination that the prices given by him were the prices charged by him in his business, and were not the market prices, the court struck out his entire testimony. From Silverman's deposition it appeared that he, personally, never made any agreement with plaintiff, or had any understanding, that defendant's wagons were to be overhauled and repainted within one year from the time they were previously overhauled and painted. Kitzinger was not called as a witness.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is contended by counsel for defendant that the court erred in not ruling that plaintiff answer all the interrogatories filed by the defendant prior to the trial. Section 32 of the Municipal Court Act provides in part that the court in any pending civil suit, at any time before final hearing, "may permit the filing therein of interrogatories to be answered by any party to such suit * * at the instance of the adverse party * * and to require an answer under oath to all such interrogatories as the party to be interrogated might be required to answer if called as a witness upon the trial or hearing of such suit." We do not think that the court abused its discretion in not requiring an answer to all the interrogatories. Plaintiff was asked to give the times and places of certain conversations had between a representative of plaintiff and representatives of defendant, and also to state all that was said at the interviews. The court directed that plaintiff give the times and places, but ruled that what was then said need not be stated. Furthermore, the defendant was not prejudiced by the ruling

of the court because on the trial plaintiff's representative, Mr. Maremont, testified fully as to what was said, material to the issues of the case, in said conversations.

It is also contended that the court erred in allowing in evidence copies of certain letters and statements written by plaintiff to Mr. Kitzinger, purchasing agent of defendant, notwithstanding that the originals of said letters were not produced by the defendant upon due notice served to produce them. The point made is, that being addressed to Kitzinger they were letters addressed to a third person, and Kitzinger should have been served with a subpoena duces tecum, etc. We think counsel's contention is without merit, as the letters were addressed to Kitzinger in his official capacity as purchasing agent of defendant, and were in effect letters sent to defendant.

And we do not think that the court erred in admitting in evidence certain written orders of defendant to plaintiff to repair and repaint certain wagons "as per contract," which orders were dated prior to the time the contract sued upon was formally accepted in writing by the defendant. Counsel contends that "written communications leading up to the making of a contract are merged in the contract," and that it was error to admit said written orders. We fail to see the application of the principle stated, because it appears that the parties treated the contract as in force prior to the date of its formal acceptance by defendant, and these written orders were given plaintiff as under the contract and said orders were afterwards executed by plaintiff under the contract.

Plaintiff introduced evidence showing that under the terms of the contract defendant, after the contract had been in force for about two years, owed it the sum of \$849.10 for vehicles overhauled and repainted, that plaintiff rendered a statement for that amount to defendant in February, 1911, and defendant acknowledged the correctness of the statement and sent plaintiff a check for \$400 to

apply on said account. Plaintiff claimed that defendant was indebted to it for the balance, \$449.10, as of February 27, 1911, under an account stated. Plaintiff also claimed that defendant was also indebted to it, under the terms of the contract and the subsequent construction thereof by the parties, for overhauling and repairing certain vehicles each year during the two years the contract was in force, but which vehicles plaintiff was not allowed to repaint, and that the amount of said indebtedness could be ascertained from the prices mentioned in the contract, deducting therefrom the fair, reasonable value of the cost of painting said vehicles. Plaintiff offered in evidence various correspondence and conversations between the parties, showing the construction both parties placed upon the contract. It is further contended by counsel for defendant that the court erred in allowing said correspondence and conversations in evidence on the ground that they tended to vary the terms of the written instrument. We do not think any error was committed in this regard. From the words "throughout the year" and "one year" found in the contract, we think it was the intention of the parties that each vehicle should receive a general overhauling and repainting by plaintiff each year during the life of the contract, and that plaintiff each year would receive as its pay for the work the price mentioned in the contract. While this intention was not as clearly expressed as it might have been, it appears from the evidence that the meaning of the contract in this particular was the subject of certain correspondence and conversations, and it also appears that both parties agreed to that construction of the contract. "It is allowable always to look to the interpretation the contracting parties place on their agreement, either contemporaneously or in its performance, for assistance in ascertaining its true meaning. No extrinsic aid can be more valuable." (Vermont Street Church v. Brose, 104 Ill. 206, 212.) "Where the construction of an instrument in writing is doubtful, and the parties there-

to have given a construction to it by acting upon it in a certain manner, courts will usually adopt and follow the construction of the instrument which has been adopted by the parties." (Hueller v. Northwestern University, 195 Ill. 236, 255.)

And we do not think that it was error for the court to allow the witness, Maremont, to refresh his recollection from a certain memorandum. Neither do we think that the court erred in striking out the testimony of the witness, Volts, after it appeared that he was not giving the market price for painting certain wagons, but only his own price.

It is further contended that the judgment is excessive inasmuch as it appears from plaintiff's testimony and from the amount of the verdict that interest is included in the verdict, which is unwarranted. It was shown by plaintiff's testimony that for the year ending December 14, 1909, five single wagons and seven double wagons were repaired, but not repainted, and that plaintiff received nothing for this work. It was also shown that for the year ending December 14, 1910, seven single wagons, six double wagons, three buggies, five carts and one mail cart were repaired, but not repainted, and that plaintiff received nothing for this work. Crediting plaintiff the prices fixed in the contract for overhauling and repainting said vehicles, and deducting the fair and reasonable market value for painting said vehicles, \$250, as shown by the testimony, viz, -

5 single wagons at \$56.25 each	\$281.25	
7 double wagons at \$70.20 each	<u>491.40</u>	\$ 772.65
7 single wagons at \$56.25 each	393.75	
6 double wagons at \$70.20 each	<u>421.20</u>	
3 buggies at \$33.75 each	101.25	
5 carts at \$22.50 each	<u>112.50</u>	
1 mail cart at \$25.	25.	<u>1053.70</u>
		\$1826.35
Painting		<u>250.</u>
there remains the sum of		\$1576.35.
Adding thereto the balance due on the account of		

\$849.10, of which \$400 was paid on February 27, 1911, viz,

449.10

there is the total sum of

\$2025.45.

The amount of the verdict and judgment was \$2431.10. It is apparent that interest was allowed not only on plaintiff's claim of \$449.10, but also on plaintiff's further claim mentioned. We think that interest should have been allowed on said claim of \$449.10, but not on plaintiff's said further claim. In our opinion plaintiff's damages were not sufficiently certain so that defendant could, without the verdict of the jury, know exactly how much it was liable for, and the case does not come within the provisions of the statute as to interest. (Brownell Improvement Co. v. Critchfield, 197 Ill. 61, 71; Bady v. Condit, 209 Ill. 436, 503; Whittemore v. People, 227 Ill. 453, 475; Esperit v. Ahlschlager, 117 Ill. App. 484, 486.)

Interest on said claim of \$449.10 from February 27, 1911, to the date of the judgment, June 20, 1914, at the rate of 5 per cent per annum amounts to \$74.48. Adding this to \$2025.45, the result is \$2099.93, for which amount we think judgment against the defendant should have been entered in the trial court. The excess of interest in the judgment can be cured by a remittitur. (O'Peara v. Cardiff Coal Co., 154 Ill. App. 321, 326.) If the plaintiff will file within ten days a remittitur in the sum of \$331.17, the judgment will be affirmed for \$2099.93; otherwise the judgment will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR.

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MARY A. O'BRIEN,
Appellee,

vs.

NATIONAL COUNCIL KNIGHTS
AND LADIES OF SECURITY,
Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

1941.A. 625

STATEMENT OF THE CASE. This is an action brought on a certificate of insurance for \$1,000, issued by the defendant, a fraternal beneficiary society, on November 23, 1909, to William F. O'Brien, a member of a local council of the society in Chicago, which certificate was made payable upon his death in good standing to Mary A. O'Brien, his mother. The insured was a teamster. He died on February 10, 1911. The certificate provided that if the insured should die after 12 months and within 18 months from the time of its delivery the society should only be liable for 80 per cent of the face thereof. The case was tried before a jury. At the conclusion of all the evidence the court instructed the jury to return a verdict in favor of plaintiff in the sum of \$918.40, which they did. The amount of the verdict was made up of \$800, principal, and \$118.40, interest. Judgment was entered on the verdict, which judgment the defendant by this appeal seeks to reverse.

The defense of the society was that it was not liable on said certificate in any amount, because (1) the insured had falsely stated in his written application the cause of the death of one of his sisters, which statement was material to the risk, and (2) the insured did not pay the assessments for any of the last 11 months of the year 1910 before the last day of the month as required, that when he did pay said assessments in the following month for the purpose of re-instatement he was not in good

1. *Journal of the American Medical Association*, 1997; 277: 1033-1038.

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health as required by the contract, which fact was not known by the society or its officers, and that he was not in good standing at the time of his death.

On the trial plaintiff introduced the certificate and the proofs of death and rested. The certificate on its face showed, inter alia, that it was issued by the society and accepted by the member upon the warranties, conditions and agreements (a) that the application, together with the report of the medical examiner, were true, (b) that if not true the certificate should be void, (c) and that the certificate should be subject to forfeiture for any of the causes of forfeiture prescribed in the by-laws of the society. From the proofs of death it appeared that Dr. James M. Frazer, commencing January 21, 1911, attended the deceased in his last illness. Dr. Frazer was subsequently called as a witness and testified that deceased died, February 10, 1911, of "acute military tuberculosis," generally known as "galloping consumption," and that he estimated that the last illness of deceased had begun about 1½ months previous to January 21, 1911.

The defendant introduced the original application for membership signed by William P. O'Brien on November 18, 1909. In this application he stated that one of his sisters died in 1901 in Chicago, at the age of 23 years, of "pleurisy," that she was sick "four weeks" and that the name of her attending physician was "Dr. Steele." He further stated that none of his sisters or other blood relatives had been "afflicted with consumption." The application contained the clauses that "I hereby declare that the foregoing answers and statements * * are warranted to be true and full, and I acknowledge and agree that the said answers and statements with this application shall form the basis of my agreement with the Order and constitute a warranty"; and that "I further agree that should I

cease to be a member of the Order, either by suspension, expulsion, or otherwise, that I hereby release and forfeit all claim whatsoever to the beneficiary * * funds"; and that "I further agree, if accepted as a member * * to faithfully abide by all its laws, rules and regulations now enacted, or that may be hereafter enacted."

The defendant also introduced the by-laws of the society in force at the time of death of the insured. It was provided by said by-laws in part as follows:

"In case any person shall make false representations in his application, * * either as to his * * health or condition, age, or family history, * * or shall conceal any other fact affecting the risk, neither such person nor his beneficiary * * shall be entitled to receive any benefits by reason of a beneficiary certificate having been issued to him."

"No member or beneficiary named in his certificate shall * * be entitled to be paid any sum from the beneficiary fund, * * who, at the time of * * death, shall be delinquent on account of non-payment of monthly or special assessments or dues, as provided by the laws of the Order."

"All assessments for every month shall become due and payable on the first day of the month. The certificate of each member who has not paid such assessments on or before the last day of the month shall, by the fact of such non-payment, stand suspended without notice, and no act on the part of the Council, or any officer thereof, or of the National Council, shall be required as essential to such suspension, and all rights under said certificate shall be forfeited. No right under such certificate shall be restored until it has been duly re-instated by the member complying with the laws of the Order, with reference to re-instatement."

"Each member who has been suspended for non-payment of dues or non-payment of an assessment or assessments shall only be re-instated in accordance with the constitution and laws of the Order."

"Any beneficiary member suspended by reason of non-payment of an assessment or assessments, or dues, may within 60 days from the date of such suspension be re-instated * * by payment within 60 days * * of all arrearages * * for which he would have been liable had he remained in good standing; provided, however, that he be in good health at the time of making payment to the financier with a view to re-instatement. * * Provided, further, that the receipt and retention of such assessment and dues, in case the suspended member is not in good health, * * shall not have the effect of re-instating said member, or of entitling him or his beneficiaries to any rights under his benefit certificate."

"The receiving of such arrears and receipting there-

for by any officer of a subordinate council, * * or by any other person, or the payment by or on behalf of any suspended member of arrears of assessments and dues with a view to re-instatement, except as provided for in the laws of the Order, shall not be binding on the National Council."

The defendant called as one of its witnesses the plaintiff. She testified that William P. O'Brien was her son; that one of her daughters, also named Mary A. O'Brien and by occupation a school teacher, died in Chicago at her aunt's home in August, 1900, at the age of 23 years, that with the exception of the period of three weeks just prior to her death said daughter lived at her (the witness') home, as did also said William P. O'Brien; and that the latter continued to live at her home up to the time of his death.

The defendant showed that said sister of William P. O'Brien was attended in her last illness by Dr. C. H. Bryan, and defendant introduced a certified copy of said physician's certificate, dated August 16, 1900, and filed in the office of the county clerk of Cook County, showing that said sister, Mary A. O'Brien, died August 15, 1900, and that the cause of her death was "pulmonary tuberculosis" of "nine months" duration.

The defendant also called as a witness William E. Cameron, the financier of the local council. It appeared from his books that each monthly assessment due from the insured was \$1.05; that the assessments due for the months of December, 1909, and January, 1910, were each paid during said months respectively, but that no payment was made during the month of February, 1910; that the assessments for the months from February, 1910, to and including December, 1910, were each paid after the last day of the month for which they were due; that the assessments due for the month of December, 1910, and for the month of January, 1911, were both paid on January 17, 1911, and that the assessment due for the month of February, 1911, was paid

February 7, 1911. Cameron testified that he occasionally "went out" with the insured, that the last time he went out with him was two or three months before he died, that while not in the best of health the insured then appeared "all right," and that when he subsequently accepted assessments on account of said insured he did not know the insured was in bad health. There was a sharp conflict in the evidence as to whether or not the assessment due for the month of February, 1910, had been paid during that month. It appears that plaintiff and Florence O'Brien, a daughter of plaintiff, were also insured in said society. Plaintiff introduced a written receipt signed by Cameron, dated "2-27-10" for \$3.05, in payment of monthly premiums for William, plaintiff and said daughter, but for what month the receipt does not disclose. Cameron testified that the date of the receipt was an error, that he actually received said amount from Florence O'Brien on January 27, 1910, and gave her a receipt for \$3.05, which was ten cents short; that \$1.05 was on Mrs. O'Briens account, \$1.05 on William's, and .95 on Florence's; and that no other payment was received on William's account until March 19, 1910. His cash book showed that he received \$1.05 on William's account on January 27, 1910, and that the next payment he received on said account was on March 19, 1910. The evidence also showed that about September 9, 1911, before the commencement of the suit, defendant tendered to plaintiff the sum of \$12.60, being the amount of the last 12 assessments paid on said certificate of insurance, but that plaintiff refused to accept the money; and that said sum was again tendered in open court and again refused.

U.S. DEPARTMENT OF COMMERCE

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MR. PRESIDING JUDGE GRISLEY DELIVERED THE OPINION OF THE COURT.

Among other grounds for reversal it is urged by counsel for defendant that the trial court erred in instructing the jury to return a verdict in favor of plaintiff. It is argued, first, that there was evidence tending to show that the insured falsely stated in his application that his sister had died of pleurisy after an illness of four weeks, inasmuch as there was evidence tending to show that she in fact died of pulmonary tuberculosis of nine months' duration; that insured also stated in his application that none of his sisters or other blood relatives had been afflicted with consumption; that these statements were material to the risk; that there was evidence tending to show that the insured knew the statements to be false, inasmuch as it appears that with the exception of three weeks immediately preceding said sister's death the insured lived in the same house with said sister, to-wit, the home of plaintiff; and that, therefore, the court erred in instructing the jury for the plaintiff. It is argued, second, that there was evidence tending to show that the assessment due for the month of December, 1910, was not paid until January 17, 1911, that at this time the insured was in bad health, which fact was unknown to the financier of the local council, or other agents, or to the society, until after the death of the insured, and that, under the by-laws of the society, the insured was not legally re-instated as a member and was not in good standing at the time of his death, and that, therefore, the court erred in giving the instruction.

We agree with both contentions and are of the opinion that under the facts in evidence the case should have been submitted to the jury under proper instructions. (Kotek v. Court of Honor, 152 Ill. App. 92, 96; Neenan v. National Council, etc., 188 Ill. App. 490.) The judgment of the Superior Court is reversed and the cause remanded.

REVERSED AND REMANDED.

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GEORGE J. COOKE COMPANY,
a corporation,
Appellee,

vs.

RICHARD HOCHMUTH,
Appellant.

Appeal from
Municipal Court
of Chicago.

194 I.A. 626

STATEMENT OF THE CASE. On January 8, 1913, George J. Cooke Company, an Illinois corporation, plaintiff, commenced an action of the first class in the Municipal Court of Chicago, against Richard Hochmuth, defendant, to recover damages for the alleged breach by defendant of a written contract executed by the parties on July 2, 1908. It was alleged in plaintiff's statement of claim that the damages, consisting of loss of profits, were sustained by plaintiff by reason of the failure and refusal of the defendant to receive and pay for 1735 barrels of beer, in accordance with the terms and conditions of said written contract, that plaintiff was at all times ready, able and willing to perform the terms and conditions of said contract to be by it performed, and that said failure and refusal of the defendant to perform was not occasioned through any fault of plaintiff. The contract is as follows:

"For and in consideration of One Dollar (\$1.00) in hand paid by each of the parties hereto to the other, the receipt of which is hereby mutually confessed, the Geo. J. Cooke Co., a legal Illinois corporation, party of the first part, agrees to sell and Richard Hochmuth, of Chicago, Cook County, Illinois, party of the second part, agrees to buy 2,000 barrels of beer, to wit:

1. All of said beer shall be delivered to the place of business of said second party at 68 Willow street, Chicago, Illinois, and to no other place, and none of said beer shall be sold or otherwise disposed of by said second party in the original packages. It is also mutually understood that all packages containing said beer are in every case to remain the property of the first party.

2. All beer delivered hereunder shall be of the following brands, namely, Ambeer, Karamalt and Pilsener, and shall be delivered as said second party may from time to time direct, except that no deliveries shall be made on Sundays or legal holidays and that all of said beer shall be delivered and taken within and during the period of time beginning July 2, 1908, and ending July 2, 1910. Time is of the essence of this contract.

It is agreed and understood by and between the parties hereto that no less than 15 barrels and no more than 40 barrels of the said beer shall be delivered and taken during each week of the period of time hereinbefore mentioned.

3. The second party agrees to pay to said first party cash on delivery for all beer delivered hereunder at the rate of \$6 per barrel for the Ambeer and Karamalt brands and \$4 per barrel for the Pilsener brand, except that said second party agrees to pay as much more for each barrel delivered hereunder, over and above the price herein mentioned, as the United States Government tax may be increased over and above \$1 per barrel.

4. It is agreed and understood by and between the parties hereto that the performance of this contract may be suspended if the said first party is prevented or hindered in carrying out its provisions by the partial or total destruction of its plant, machinery or equipment, by fire, action of the elements, or accident, or by strikes or lock-outs, or if said second party is prevented or hindered in disposing of said beer, by fire or other damages to the premises used by him for that purpose; it being understood, however, that such suspension shall continue only during the existence of such disability or hindrance, and provided that either party may declare the contract annulled if any such disability or hindrance continues for a period of six months or more.

5. This contract may be assigned by said second party only with the consent of said first party, endorsed in writing hereon.

IN WITNESS WHEREOF, said first party has caused these presents to be executed by its President and said second party has hereunto set my hand and seal this second day of July, 1908.

GEO. J. COOKE COMPANY,
By GEO. J. COOKE, Pres.
RICHARD HOCHMUTH. (Seal)"

In his amended affidavit of merits, filed February 24, 1913, defendant admitted the execution of said contract and alleged, inter alia, that subsequently, on August 1, 1908, plaintiff and defendant made a verbal agreement by which plaintiff agreed to deliver to defendant all beer to be used by him in his saloon at \$3.50 per barrel; that in pursuance of said

verbal agreement all beer was subsequently sold and delivered by plaintiff to defendant; that defendant has paid plaintiff in full for all beer so delivered to defendant; and that when said verbal agreement was made the written agreement was canceled.

The case was called for trial before a jury on December 18, 1913, and during the progress of the trial the defendant was allowed to file, and did file, an amendment to said affidavit of merits, in which defendant alleged that plaintiff agreed to sell and deliver to him a good, merchantable quality of beer, and that the beer so delivered to him was not of a good and merchantable quality.

The jury returned a verdict finding the issues against the defendant and assessed plaintiff's damages at \$1,824.45, upon which verdict the court, on February 27, 1914, after overruling defendant's motions for a new trial and in arrest of judgment, entered judgment against the defendant, which judgment it is sought by this appeal to reverse.

The following facts were disclosed by the evidence: In March, 1908, defendant purchased the saloon business, corner of Willow and Burling streets, Chicago, of Joseph Julian, who had been purchasing beer from plaintiff. After defendant took over said business he bought his beer from another brewing company. Martin Bock, agent of plaintiff, made frequent calls on defendant in the endeavor to get defendant to purchase plaintiff's beer. As a result defendant, on June 23, 1908, purchased of plaintiff 20 barrels of beer of the Pilsener brand at \$4 per barrel. On July 2, 1908, defendant went to the office of plaintiff, saw George J. Cooke, president, and signed the written contract sued upon. Shortly thereafter defendant again called on said Cooke, informed him he could sell much more beer than the amount per week mentioned in the contract, and that if

plaintiff would make it an inducement to him he would agree to sell plaintiff's beer exclusively. Cooke, acting for plaintiff, thereupon verbally agreed with defendant that, in consideration of defendant agreeing to buy plaintiff's beer exclusively, plaintiff would allow him a credit of \$112 for the 28 barrels of beer previously delivered and would sell him beer in the future at a price 50 cents less than that mentioned in the written contract. It does not appear that the written contract was canceled but merely that the price at which the beer was to be sold was reduced by 50 cents per barrel. Subsequently defendant's account was credited in the sum of \$112, and defendant from time to time thereafter, until November 13, 1908, under said written contract as so changed, purchased 265 barrels of beer of the Pilsener brand of plaintiff at said price of \$3.50 per barrel, and paid plaintiff for the same. During this period only one-half barrel was returned, and that because the barrel was leaking, and for which defendant received a credit. On November 13, 1908, defendant sold out his saloon business, corner of Willow and Burling streets, to the Brand Brewing Company, and his whiskey, glasses, etc., to a man named Koch. Thereafter defendant refused to order or accept the delivery of any more beer from plaintiff, although there were still to be delivered under said contract 735 barrels. Under the terms of the contract all of these remaining barrels were to be delivered by July 2, 1910, and plaintiff's evidence disclosed that the average cost of the manufacture of the beer of the Pilsener brand for the years 1908, 1909 and 1910 was about \$2.45 per barrel.

MR. PRESIDING JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff tried the case upon the theory that the

measure of damages for the breach of said written contract was the difference between the cost per barrel of manufacturing and delivering the beer and the contract price. The court adopted this as the correct rule, under the facts of this case, and the verdict of the jury is in accord therewith. The testimony of George J. Cooke, president of plaintiff, showed that the average cost of the manufacture of the Pilsener brand of beer mentioned in the contract for the years 1908, 1909 and 1910 was about \$2.45 per barrel. The contract price, reduced by the verbal agreement above mentioned, was \$3.50 per barrel. The difference is about \$1.05 per barrel, which difference on 1735 barrels is substantially the amount of the verdict and judgment. The contract, in our opinion, clearly shows that the beer was to be manufactured by the plaintiff and delivered to the defendant, from time to time, during the two year period mentioned, and we think the trial court adopted the proper rule as to the measure of plaintiff's damages. (George J. Cooke Co. v. Bell, 175 Ill. App. 532; Kingsman & Co. v. Hanna Wagon Co., 74 Ill. App. 22, aff'd 176 Ill. 545; Todd v. Gamble, 148 N. Y. 382.)

Counsel for defendant also contends that the court erred in not granting defendant's motion to strike from the record the testimony of Mr. Cooke as to the cost of the manufacture during each of said years of said Pilsener brand of beer. He testified on direct examination that the average cost for the year 1908 was \$2.81 per barrel, for the year 1909 \$2.40, and for the year 1910 \$2.53 per barrel. On cross-examination he was asked how he knew the cost of manufacture of said beer during said years to be as he testified, and he replied that his information was obtained partly from his general knowledge of the business, he having had personal supervision of the manufacture of the beer, the buying of ingredients, the hiring of the help, etc., and having been the

general superintendent of the plant; that for the exactness of his figures he relied upon the books, which showed the exact cost of manufacture figured each year at the time of taking the annual inventory; and that he had refreshed his memory from an examination of those books; and that he personally knew the figures given were correct. Defendant's attorney then moved that this testimony be stricken out "because the witness testifies partly, or in a great part, from what he saw in the books and not from his own memory," but the court denied the motion. We do not think the trial court erred in this ruling. The objection was not on the ground that the books were the best evidence and should be produced, but merely went to the source and extent of the witness' knowledge. The witness testified from his own personal knowledge, and the fact that he confirmed that knowledge by looking at the books before the trial did not render such testimony incompetent.

Some evidence was introduced by defendant tending to show that the beer which had been delivered to defendant was bad and of an unmerchable quality. But the preponderance of the evidence is to the contrary. Even the defendant testified that he was satisfied with the price and "was satisfied with the beer." Furthermore, it clearly appears that the reason the defendant refused to accept further deliveries after November 13, 1908, was that he had sold out his business and not because the beer was not of good quality.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

684 - 21022

ANNETTE GROSVENOR,
Appellee,

vs.

JOHN GROSVENOR,
Appellant.

Appeal from

Circuit Court,

Cook County.

194 I.A. 652

MR. PRESIDING JUSTICE CHASEY DELIVERED THE DECISION OF THE COURT.

On March 13, 1913, Annette Grosvenor, complainant, filed a bill for divorce in the Circuit Court of Cook County, against her husband, John Grosvenor, defendant, on the ground of impotency. The bill alleged in substance that the parties were married on July 12, 1904, and continued to live together until March 13, 1913; that for years before the marriage defendant had been addicted to self-abuse or masturbation which had so injuriously effected his sexual functions as to destroy his capacity and desire for sexual intercourse that the marriage was never consummated by such intercourse; that since the marriage defendant has been under the care and direction of physicians; that he will not exercise a moral restraint over himself so that his condition of impotency is incurable, and that because of defendant's condition he has become a moral degenerate and has sought intercourse in an unnatural way. The answer of defendant admitted the marriage, but denied the other material allegations of the bill. A hearing was had in open court in February, 1914, before the chancellor and a decree was entered granting complainant an absolute divorce, which decree defendant by this appeal seeks to reverse.

The evidence introduced before the chancellor was conflicting. Complainant, her brother-in-law, and two phy-

sicians were called as witnesses in her behalf. One of the physicians testified that about two years before the hearing defendant called upon him saying that he (defendant) desired treatment for impotency, that he instructed defendant how to take care of himself and subsequently treated him for two or three months. Complainant's brother-in-law testified that in March, 1913, defendant stated to him that he had "not been able to perform the proper functions of a husband in connection with his marriage," and that at another time defendant stated to him that "he had been told that his condition was from hereditary causes." Complainant testified in substance that from the day of the marriage until she left defendant in March, 1913, there never had been a proper consummation of the marriage; that soon after the marriage she "caught him practicing masturbation"; that frequently thereafter, and down to the time she left him, he continued in this practice; that because of this practice he was never able to properly perform the act of coition with her, and at times sought intercourse with her in an unnatural way; and that in said practice of masturbation "year after year he got worse." Two physicians, called as witnesses in behalf of defendant, testified to the effect that defendant called upon them in the month of November, 1913 (more than seven months after the filing of the bill), and requested that they examine him to ascertain whether or not he was impotent; that they examined him and that they were of the opinion that he was potent at that time. The defendant also testified in his own behalf. His testimony amounted in effect to a denial of every material statement of the complainant. He did not, however, deny that prior to March 13, 1913, he had been treated for impotency.

el 40 Section 1 of the Divorce Act of Illinois provides in part as follows:

"That in every case in which a marriage has been, or hereafter may be, contracted and solemnized between any two persons, and it shall be adjudged * * that either party at the time of such marriage was and continues to be naturally impotent, * * it shall be lawful for the injured party to obtain a divorce and dissolution of such marriage contract."

In the case of Griffeth v. Griffeth, 162 Ill. 368, 377, it is said: "Incurably is, in our opinion, what is meant by 'naturally,' as used in the statute, when applied to impotency. It seems to us both upon reason and authority, that to be 'naturally impotent,' as said in the statute, is to be impotent or incapable in the matter of performing coition with the other sex as nature prompts, and incurably so." In the same case (p. 371) it is said: "To obtain a divorce upon the ground of impotency it must be shown * * that the defect existed at the time of the marriage and that it is incurable; and the burden of proof is upon the complainant to establish these facts. (Lorenz v. Lorenz, 93 Ill. 376.) Where the defect in the husband proceeds from self-abuse, if he will not exercise a moral restraint over himself, and test the curability of his disorder by proper self-control, his wife has a right of action on the ground of his impotence."

It is contended by counsel for defendant that the evidence is not sufficient to sustain the decree. While the evidence is conflicting, we are of the opinion that the decree is sufficiently supported by the evidence. The chancellor saw all the witnesses and heard them testify and was in a much better position to judge of their credibility than we are from a perusal of their testimony as it appears in the certificate of evidence. Where such is the case a court of review will not disturb the decree unless it is manifestly against the weight of the evidence. (Griffeth v. Griffeth, 162 Ill. 368, 375; Heyman v. Heyman, 210 Ill. 524, 529.) We are unable to say that the decree is manifestly against the weight of the evi-

ence, or that the chancellor abused his discretion in granting the decree. There is testimony tending to show that through long continued indulgence in self-abuse the defendant had become unable to perform the act of coition with complainant, that this condition existed at the time of the marriage and continued to exist until complainant left defendant, and that during all of said time, while defendant made efforts to cure himself of his habit and his disorder, he would not exercise sufficient moral restraint over himself so as to test the curability of his disorder by proper self control. and there is testimony that about the time complainant left him defendant in effect admitted that he was impotent. Whether this admission of defendant should be taken as evidence "depended upon whether the chancellor was satisfied that it was made in sincerity and without fraud or collusion." (Lorenz v. Lorenz, 93 Ill. 376, 378.)

It appears from the certificate of evidence that after all the evidence had been received and both parties had rested, the defendant in open court offered himself for medical examination and suggested that the chancellor appoint competent and disinterested physicians and surgeons to examine defendant and make a report "as to his physical condition regarding potency." The chancellor disregarded the offer and refused to follow the suggestion. It is urged by defendant's counsel that this was error. In view of the fact that the suggestion did not come until after the chancellor had heard all the evidence and was about to render his decision, and in view of all the facts in evidence, we do not think that any error was committed which warrants a reversal of the decree. Neither do we think, as contended by counsel, that the fact that complainant did not file her bill until more than eight years after the marriage precludes her obtaining a divorce upon the ground of the

impotency of defendant. It was a circumstance to be considered by the chancellor together with all the other facts and circumstances in evidence. (Lorenz v. Lorenz, supra.)

The decree of the Circuit Court is affirmed.

AFFIRMED.

1000

196157
225 - 19618.

872

Bartholomae & Manning

BARTHOLOMAE & MANNING BREWING
& MALTING COMPANY, a corporation,
Appellant,

AUTUAL PRIDE
MUNICIPAL COURT
OF CHICAGO.

vs.

SOUTH SIDE TRUST & SAVINGS
BANK, a corporation,
Appellee.

194 I.A. 654

MR. JUSTICE BASSETT DELIVERED THE OPINION OF THE COURT.

This suit was brought to recover the amount due on a check for \$1311.79, dated August 22, 1913, drawn by appellee to the order of appellant on a bank at Gary, Indiana, which refused payment thereof September 5, 1913. Liability on said check is not denied, the only question at issue being whether appellee was entitled to a set-off allowed by the court before which the case was tried without a jury on an agreed state of facts.

Appellee claimed the right to set off the amount of a check on a bank in East Chicago, Indiana, for \$550, dated November 21, 1910, drawn by appellant to the order of L. Kardesh, to whom appellee paid the amount without notice of any defense thereto. Payment thereof having been stopped by appellant, appellee credited on the check to Kardesh \$200, the amount of a deposit he had in its bank when said payment was stopped, and for the balance of \$350, took the note of Kardesh and one Click, later obtaining a judgment against them thereon which remains unsatisfied.

The court properly held that a note accepted as

payment operates as a satisfaction of the pre-existing debt for which it was given. But appellee urges and the court presumably found, that the note in question was not accepted as payment of the balance due on the check. In view of the language of the stipulation, it is difficult to see how this contention can be made. It was expressly stated in open court as part of the stipulation that the deposit of \$200 to Kardosh's credit "was applied in part payment by the bank on this check, leaving a balance of \$300 due; that at the same time Louis Kardosh and one Click * * * were required by the bank to give notes to the extent of \$300 in payment of the balance of the account, the balance of this check, \$300." From such language, it must be inferred that the parties expressly agreed to accept the note as payment for the balance due on the check, and payment manifestly can not be required a second time. On such a state of facts, the court should have rendered judgment on the check sued on and not have allowed the set-off. Judgment must be entered here for the amount of said check, together with interest at the rate of 5% per annum from September 5, 1912.

REVERSED AND JUDGMENT HERE.

225 - 19615.

FINDING OF FACT.

The court finds that the check for \$1311.79 sued on remains due and unpaid, together with interest thereon at 6% from September 9, 1912, and that the check for \$500, pleaded as a set-off, has been paid.

SOUTH SIDE STATE BANK, a
corporation,
Defendant in Error,

vs.

FOX RIVER DISTILLING CO.,
a corporation,
Plaintiff in Error.

WRIT TO THE MUNICIPAL COURT
OF CHICAGO.

1941 A. 655

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This writ of error brings for review a judgment for \$103.90 in favor of the South Side State Bank, plaintiff to the action, against the Fox River Distilling Co., a corporation, upon a promissory note for \$100 and interest, given by the Lavigne Company to M. F. Curtis, endorsed by said defendant corporation, and discounted by said bank. The defense was ultra vires, it being set up in the affidavit of merits that said corporation's endorsement was for accommodation only, of which the bank had full knowledge.

The question presented is whether the finding of the court was not contrary to the evidence. The evidence shows that the Lavigne Company purchased property of said Curtis, giving him the note in question as part of the purchase money; that Harry Lavigne, its president, met Curtis at plaintiff's bank and had an interview with its president as to discounting the note; that the latter required an endorser, and thereupon Lavigne went to the president of defendant company, who endorsed the note in the name of the corporation by himself as its president. The endorsement appeared above that of Curtis. In that form Lavigne returned it to the bank shortly afterwards and the latter discounted the note.

The endorsement in that form was prima facie the

signature of the corporation. (Eyre v. Tucker, 24 Ill. 181). Plaintiff, therefore, was charged with knowledge, not only of the fact that the endorsement was that of a corporation, but that it was for accommodation only, for when first presented for discount and when discounted, it was still in the possession of either the maker or payee, and was evidently discounted upon the strength of such endorsement procured expressly at the bank's request for the purpose of having the bank discount it. Under such circumstances the bank can not claim to be an innocent holder in good faith. The character of the transaction was such as to indicate that the defendant company was not an endorser in the usual course of negotiation but for mere accommodation, an act not within the scope or part of the ordinary business of a commercial corporation like defendant company as its very name indicates, and was, therefore, ultra vires, of which plaintiff, under the circumstances, could not plead ignorance. (Rational Home Bldg. Assn. v. Bank, 101 Ill. 35.) No question of good faith or estoppel arises in this case. The plaintiff was presumed to know the law and the facts were such as to give it notice of the real nature of the transaction.

It is argued by counsel for defendant in error that the endorsement might come within the implied powers of the corporation. There are no facts in the case upon which to predicate the argument or rest such a presumption.

The facts are very like those in the case of Pick, Bloch & Jael v. Ellinger, 66 Ill. App. 370, where an endorsement of a corporation was procured to satisfy the party to whom the payee of the notes, or its representative, took the notes for discount, the court holding that the party discounting them must have believed that the endorsement was made in fulfillment of the

dorsement was a mere accommodation and not within the scope of corporate business. See also Riser v. Serota et al., 183 id. 300. There is no question but that when paper is endorsed by a corporation for accommodation and the taker of it knows that such is the fact, the corporation will incur no liability. (10 Cyc 1121(d)). It is stated in Daniels on Negotiable Instruments, Vol. 1, Sec. 386, that "unless the corporation be specially authorized to do so, the execution or endorsement of accommodation paper for the benefit of a third person is an act beyond the scope of its authority, but * * * a bona fide holder taking without notice of its character could enforce it." But it can not be said in the present case that the bank took the note without notice of its character. The endorsement in question was procured at its instance as the condition on which it would discount the note. It being ultra vires and plaintiff chargeable with notice of the character of the endorser, there was no liability on the part of the corporation, and the judgment must be reversed. We find nothing in our act on negotiable instruments that justifies a different conclusion.

REVERSED.

(Over)

We find that the endorsement of the plaintiff in error, Fox River Distilling Co., a corporation, on the note sued on was for accommodation merely and that the defendant in error, South Side State Bank, took and discounted the said note with knowledge of that fact and notice that the endorser was a corporation.

THE UNIVERSITY OF CHICAGO

CHICAGO, ILL.

TO THE PRESIDENT OF THE UNIVERSITY OF CHICAGO
FROM THE DEAN OF THE FACULTY
SUBJECT: A REPORT ON THE PROGRESS OF THE FACULTY
DURING THE YEAR 1911-12
The following report is submitted to you by the Dean of the Faculty, in accordance with the resolution of the Faculty passed at its meeting on June 1, 1912. It contains a summary of the work of the Faculty during the year 1911-12, and a statement of the progress of the various departments of the University.

292 - 20224

SOUTH SIDE STATE BANK,
Defendant in Error,

vs.

FOX RIVER DISTILLING CO.,
Plaintiff in Error.

ERROR TO THE MUNICIPAL COURT
OF CHICAGO.

194 I.A. 657

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The record of this case presents with very little variance the same state of facts and the same question for review and between the same parties as case No. 20054, South Side State Bank, Defendant in Error, v. Fox River Distilling Co., a corporation, Plaintiff in Error, in which we have this day filed an opinion reversing the judgment of the court below with a finding of fact. The same action on the same grounds must be taken in the present case. In both cases the bank sought to recover from the distilling company, as an endorser of a note for \$100 given by the Lavigne Company to one Curtis as part purchase money of property which, in this record, appears to have been a saloon. The circumstances are more amplified in this case than in the one referred to, but the facts are not materially different. From the record in this case it appears that there were a series of notes for \$100 each, one maturing each month for several successive months, and that Curtis agreed to take such notes and have them discounted at plaintiff's bank if the Lavigne Company would get an endorser thereon and that both Curtis and Lavigne, president of the Lavigne Company, maker of the notes, went to the bank and had an interview with its president, Mahan, as to whether the bank would discount the notes with the Fox River Distilling Co. as endorser; that

Lahan "looked up" the company and said he would; that thereupon Lavigne procured the endorsement of the said corporation, reading "The Fox River Distilling Company, By Charles Ledowsky, President;" that this was done before Curtis either endorsed or accepted the note or notes; that said endorsement was placed thereon as a mere matter of accommodation and for the express purpose of having the notes discounted at the bank; that thereupon they were returned to the bank, accepted by Curtis and discounted by the bank, and the proceeds placed to Curtis' credit. A certified copy of the articles of incorporation of the Fox River Distilling Company was also introduced in evidence, showing that the object for which it was formed was for the sale of whiskies in bond and the general sale of liquors. There is nothing in the record to indicate, or from which an inference may justly be drawn, that the endorsement by the defendant corporation was in the ordinary course of negotiation, or otherwise than for the express purpose of having the note discounted, and that this was known by both the president of said corporation and the president of the bank that discounted the note. Under such circumstances there was no liability on the part of the corporation. Its act in making said endorsement was ultra vires, and what we said in the opinion above referred to is equally applicable to the state of facts in the present case.

Upon the abstract and briefs in this case have been submitted to us the records on writs of error from judgments on five other notes of said series, being cases Nos. 20179, 20559, 20560, 20561, and 20680, and the same conclusion must be reached in each case.

REVEREND.

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FINDING OF FACT.

We find that the endorsement of the plaintiff in error, Fox River Distilling Co., a corporation, on the note sued on was for accommodation merely, and that the defendant in error, South Side State Bank, took and discounted the said note with knowledge of that fact and notice that the endorser was a corporation.

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1953

249 - 20179

SOUTH SIDE STATE BANK,
Defendant in Error,

vs.

FOX RIVER DISILLING CO.,
a corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

194 I.A. 658

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This case was consolidated with No. 20224, between the same parties, for hearing upon the abstracts and briefs filed in the latter case, and presents the same state of facts and involves the same question and the same parties, the only difference being that the action was brought upon a separate note, one of the series referred to in the opinion filed this day in case No. 20224. The conclusion, therefore, must be the same, namely, a reversal with a finding of fact. What we said in said opinion and that filed in No. 20054, between the same parties, manifestly involving another note of the same series, is controlling here and need not be repeated.

REVERSED.

249 - 20179.

FINDING OF FACT.

We find that the endorsement of the plaintiff in error, Fox River Distilling Company, a corporation, on the note sued on was for accommodation merely and that the defendant in error, South Side State Bank, took and discounted the said note with knowledge of that fact and notice that the endorser was a corporation.

1884-1885

1884-1885

1884-1885

1884-1885

235 - 20559.

SOUTH SIDE STATE BANK,
a corporation,
Defendant in Error,

vs.

FOX RIVER DISTILLING COMPANY,
a corporation,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT
OF CHICAGO.

194 I.A. 659

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This case was consolidated with No. 20224, between the same parties, for hearing upon the abstracts and briefs filed in the latter case, and presents the same state of facts and involves the same question and the same parties, the only difference being that the action was brought upon a separate note, one of the series referred to in the opinion filed this day in case No. 20224. The conclusion, therefore, must be the same, namely, a reversal with a finding of fact. What we said in said opinion and that filed in No. 20054, between the same parties, manifestly involving another note of the same series, is controlling here and need not be repeated.

REVERSED.

235 - 20559.

FINDING OF FACT.

We find that the endorsement of the plaintiff in error, Fox River Distilling Company, a corporation, on the note sued on was for accommodation merely and that the defendant in error, South Side State Bank, took and discounted the said note with knowledge of that fact and notice that the endorser was a corporation.

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236 - 20560

SOUTH SIDE STATE BANK, a
corporation,
Defendant in Error,

vs.

FOX RIVER DISTILLING COMPANY,
a corporation,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

194 I.A. 660

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This case was consolidated with No. 20224, between the same parties, for hearing upon the abstracts and briefs filed in the latter case, and presents the same state of facts and involves the same question and the same parties, the only difference being that the action was brought upon a separate note, one of the series referred to in the opinion filed this day in case No. 20224. The conclusion, therefore, must be the same, namely, a reversal with a finding of fact. What we said in said opinion and that filed in No. 20054, between the same parties, manifestly involving another note of the same series, is controlling here and need not be repeated.

REVERSED.

NEW YORK STATE BANK,
CORPORATION,
INCORPORATED IN NEW YORK

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236 - 20560.

FINDING OF FACT.

We find that the endorsement of the plaintiff in error, Fox River Distilling Company, a corporation, on the note sued on was for accommodation merely and that the defendant in error, South Side State Bank, took and discounted the said note with knowledge of that fact and notice that the endorser was a corporation.

237 - 20561.

SOUTH SIDE STATE BANK, a
corporation,
Defendant in Error,

vs.

FOX RIVER DISTILLING COMPANY,
a corporation,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

194 I.A. 661

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This case was consolidated with No. 20224, between the same parties, for hearing upon the abstracts and briefs filed in the latter case, and presents the same state of facts and involves the same question and the same parties, the only difference being that the action was brought upon a separate note, one of the series referred to in the opinion filed this day in case No. 20224. The conclusion, therefore, must be the same, namely, a reversal with a finding of fact, that we said in said opinion and that filed in No. 20054, between the same parties, manifestly involving another note of the same series, is controlling here and need not be repeated.

REVERSED.

THE UNIVERSITY OF CHICAGO

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

4. *How much time do you spend on the Internet each week?*

[illegible]

11. *Journal of the American Medical Association*, 273:1271-1272, 1995

of the same matter, to which the following is added:

• [La Roche](#)

237 - 20561.

FINDING OF FACT.

We find that the endorsement of the plaintiff in error, Fox River Distilling Company, a corporation, on the note sued on was for accommodation merely and that the defendant in error, South Side State Bank, took and discounted the said note with knowledge of that fact and notice that the endorser was a corporation.

150809 - 480

350 - 20680.

SOUTH SIDE STATE BANK,
a corporation,
Defendant in Error,

vs.

FOX RIVER DISTILLING COMPANY,
a corporation,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

1941 A. 662

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This case was consolidated with No. 20224, between the same parties, for hearing upon the abstracts and briefs filed in the latter case, and presents the same state of facts and involves the same question and the same parties, the only difference being that the action was brought upon a separate note, one of the series referred to in the opinion filed this day in case No. 20224. The conclusion, therefore, must be the same, namely, a reversal with a finding of fact. That we said in said opinion and that filed in No. 20054, between the same parties, manifestly involving another note of the same series, is controlling here and need not be repeated.

REVERSED.

350 - 20680.

FINDING OF FACT.

We find that the endorsement of the plaintiff in error, Fox River Distilling Company, a corporation, on the note sued on was for accommodation merely and that the defendant in error, South Side State Bank, took and discounted the said note with knowledge of that fact and notice that the endorser was a corporation.

70 - 20372.

GUST F. HERRON,

Plaintiff in Error,

vs.

CHAS. J. DUNNIN and
JAMES BAKAROS,

Defendants in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

194 I.A. 663

MR. JUSTICE BARKER DELIVERED THE OPINION OF THE COURT.

Plaintiff in error and defendants in error were plaintiff and defendants respectively to a suit brought on a promissory note for \$500, given by the latter to the former as part consideration of a bill of sale by which plaintiff sold property consisting of a leasehold interest in a theatre building and its equipment.

When an agreement was reached to make the sale, \$100 was paid thereon and a receipt given by plaintiff therefor "as part payment of a total sum of \$3300," for the property, it stating that "Balance of \$3300 to be paid when papers were drawn if found to conform with regulations of Building and Health Departments on or before 30 days from date of said papers." The receipt was given July 9, 1913, and the bill of sale executed nine days later when defendants paid \$2700 in cash and gave the note in question.

The affidavit of defense set up that at the time plaintiff agreed to sell the theatre it did not conform to the city ordinances relating to ventilation; that plaintiff so knew and fraudulently concealed the fact from defendants and induced them to sign the note by misrepresentation and fraud, and that after the note was given, he agreed to take

the theatre back and refund the money paid thereon and cancel the note, and had failed to carry out his promises.

At the trial, defendants seemed to have relied on both a contemporaneous and a subsequent oral agreement, the former to the effect that payment of the note was conditional on the building being in conformity with the requirements of the Health Department of the city of Chicago for theatres. This was an attempt to vary the terms of a note absolute on its face. The rule is well settled that the maker of a note can not show against the payee an oral contemporaneous agreement which makes the note payable on a contingency. (Fox v. Blackstone, 31 Ill. 533; Hamford v. Peleman, 137 Id. 359; Schultz v. Meyer, 181 Ill. App. 335, and cases there cited.)

As to a subsequent agreement to the effect pleaded, even if there was one, neither said affidavit nor the evidence showed a consideration therefor.

Not only does the matter charged as a misrepresentation and fraud, if true, viz: that the building conformed to the city ordinances, amount to no more than an expression of opinion, but it related to matters equally within the knowledge of both parties, or as to which defendants were put upon inquiry. Besides, in neither the agreement to sell nor the bill of sale itself, did plaintiff vouch or warrant that the theatre conformed to the city ordinances and regulations. The bill of sale contained no condition except that the money paid was to be refunded if the lease was not delivered, and the note sued on was unconditional.

Defendants rely in part upon the clause in the receipt above quoted as to the payment of the balance of \$3500, viz: "when the papers were drawn if found to conform with the re-

gulations of the Health and Building Departments on or before thirty days from the date of said papers." While the clause is somewhat ambiguous, defendants can not complain that they did not take more time to ascertain whether the building did conform to such regulations. Whatever this provision may have meant, it was waived by accepting the bill of sale and taking possession of the building thereunder.

It is manifest from the evidence that the note for \$500 was given to make up the \$3200 consideration for the property sold and delivered, and which defendants still retained without any attempt to rescind the contract of sale. There being no proof of fraud or failure of consideration, or of a subsequent valid agreement, and no proof being admissible to vary the terms of the note, the judgment will be reversed and judgment entered here that should have been entered by the court before which the case was tried without a jury. The note was dated July 18, 1913, and payable thirty days after date, "with interest at the rate of 1% per annum, after _____." Its legal construction requires computation of interest at the rate of 1% per annum from August 18, 1913, to the date of filing this opinion.

REVERSED.

70 - 20372

FINDING OF FACT.

We find that the note sued on was part consideration for the personal property sold and delivered by plaintiff in error, Gust. F. Mesch, to defendants in error, Chas. J. Dennis and James Bakakos; that the same remains due and unpaid; that the amount now due thereon from defendants in error to plaintiff in error is \$510.66; that payment of said note was made unconditional, and that defendants in error were not induced to execute said note by fraudulent representations, and that there was no agreement to cancel the same or any consideration for such an agreement.



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11/2/65	WA Mont...	326-7470
11-19-65	LA...	326-7470
7/1/7	LA...	CE-6-0720
5-12	LA...	AN-3-7431
6-10	LA...	AN-3-7431
2-10	LA...	RA-6-6656
5-5	LA...	AN-3-1131
	LA...	AN-3-6400
	LA...	AN-3-6400

